No. 76-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, METROPOLITAN LIFE INSURANCE COMPANY AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN WASHINGTON, D.C. CHAPTER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME ACKERMAN
MICHAEL S. HORNE
RODERICK A. DEARMENT
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Petitioner, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Petitioner, John Hancock Mutual Life Insurance Company

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Petitioners, The Prudential Insurance Company of America ("Prudential"), Metropolitan Life Insurance Company ("Metropolitan") and John Hancock Mutual Life Insurance Company ("John Hancock"), respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review before judgment petitioners' appeals now pending in that Court of Appeals from an order and opinion of the United States District Court for the District of Columbia.[1]

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[1] In addition to the District of Columbia Chapter of the National Organization for Women, the other respondents, collectively

OPINIONS BELOW

The memorandum opinion of the District Court, which has been reported at 14 FEP cases 83, appears at Appendix A to this petition. As a writ of certiorari before judgment is being sought, there is no full opinion below by the Court of Appeals. However, on January 19, 1977 the Court of Appeals denied a stay in this case evidently on the authority of *Sears, Roebuck & Co.* v. *General Services Admin.*, 509 F.2d 527 (D.C. Cir. 1974), which deals with the same issues.[2] *See* Appendix D.

JURISDICTION

The order of the District Court permitting disclosure of the documents at issue, which appears at Appendix B to this petition, was entered on December 6, 1976. On December 16, 1976, petitioners, Prudential, Metropolitan and John Hancock, each filed notices of appeal from the District Court's order and those appeals have been docketed and consolidated by the

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referred to as the Federal respondents, are now: Social Security Administration of the Department of Health, Education and Welfare; Joseph A. Califano, Jr., in his official capacity as Secretary, U.S. Department of Health, Education and Welfare; James B. Cardwell, in his official capacity as Commissioner of Social Security; Everett M. Friedman, in his official capacity as Chief, Insurance Compliance Staff, Social Security Administration of HEW; F. Ray Marshall, in his official capacity as Secretary of Labor; A. Diane Graham, in her official capacity as Acting Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor.

[2] Earlier on December 16, 1976 the District Court issued an order temporarily enjoining release of the documents in question to permit the petitioners to seek a stay pending appeal from the Court of Appeals. This December 16, 1976 Order appears at Appendix C.

United States Court of Appeals for the District of Columbia Circuit. *See* Appendix D. The jurisdiction of this Court to issue a writ of certiorari before judgment is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a private employer's EEO-1 reports in the possession of a Federal agency, other than the Equal Employment Opportunity Commission, are made exempt from disclosure by the (b)(3) exemption in the Freedom of Information Act and that exemption's incorporation of 42 U.S.C. § 2000e-8(e) and 44 U.S.C. § 3508(a).

Whether a private employers' EEO-1 reports and related affirmative action plans (AAPS) in the possession of a Federal agency are made exempt from disclosure, insofar as they contain confidential statistical data, by the (b)(3) exemption's incorporation of 18 U.S.C. § 1905.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552, known as the Freedom of Information Act, provides in part:

> "§ 552 Public Information, agency rules, opinions, orders, records, and proceedings.
>
> * * *
>
> (b) This section does not apply to matters that are—
>
> * * *
>
> (3) specifically exempted from disclosure by statute;"

(The full text of 5 U.S.C. § 552 is set forth in Appendix E)

Section 709 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8 provides in part:

> "§ 2000e-8 Investigations—Examination and copying of evidence related to unlawful employment practices.
>
> • • •
>
> (e) Prohibited dislosures; penalties
>
> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year."

(The full text of 42 U.S.C § 2000e-8 is set forth in Appendix E)

44 U.S.C. § 3508(a) provides:

> "§ 3508. Unlawful disclosure of information; penalties; release of information to other agencies
>
> (a) If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency."

(The full text of 44 U.S.C. § 3508 is set forth in Appendix E)

18 U.S.C. § 1905, sometimes referred to as the Trade Secrets Act, provides:

> "1905. Disclosure of confidential information generally
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

STATEMENT OF THE CASE

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the competing considerations favoring

access to Government records on the one hand and recognizing on the other the legitimate interest in confidentiality of those who supply information to the Government typically require a carefully reasoned balancing of the FOIA's disclosure provisions with its exemptions, and with various other relevant statutes precluding or penalizing disclosure of records in the possession of the government. In dealing with the issue now before the Court, however, the lower courts have adopted a wholly mechanical test. Under it, the end result depends entirely on whom a request for information is directed to rather than on what information is being requested. Thus, if a member of the public, pursuant to the FOIA, requests the Employment Information Reports EEO-1 ("EEO-1 reports") filed by the petitioners, or by any of the thousands of other employers who file such reports, *and* if the request is addressed to the Equal Employment Opportunity Commission ("EEOC"), it must be denied. Indeed, the responsible officials of the EEOC would be subject to criminal prosecution if they granted the request. But if the *same* member of the public, pursuant to the *same* Act, requests the *same* EEO-1 reports of the *same* employer from a *sister agency* of the *same* Federal Government, such as the Office of Federal Contract Compliance Programs ("OFCCP"), it is so clear as a matter of law (at least in the eyes of two members of the Court of Appeals below) that the documents must be disclosed forthwith that parties seeking to prevent disclosure of their records are not even to be accorded the right to a full hearing on the merits before disclosure occurs.

This is senseless. It does not serve the interests of the supplier of the information, it does not serve the

interests of private parties seeking the information, and it does not serve the interests of the Government. It is an approach which made no sense to Mr. Justice Douglas. *Chamber of Commerce* v. *Legal Aid Society,* 423 U.S. 1309, 1311-13 (1975). It is so capricious an approach that to urge it is to suggest or imply that the Congress acted either out of ignorance of its own statutes or with an utterly irrational legislative intent. But it is the approach which the courts below, putting form miles above substance, would make the law of the land.

The instant case grows out of a request under the FOIA made by the respondent District of Columbia Chapter of the National Organization for Women ("NOW") for access to, among other things, the EEO-1 reports and certain affirmative action materials submitted by the insurance company petitioners to various Federal agencies. NOW's request was addressed to the Insurance Compliance Staff of the Social Security Administration, which has direct responsibility over the insurance industry in the enforcement of the equal employment opportunity obligations imposed on Government contractors by Executive Order 11246, 3 C.F.R. 169-177 (1974).[3]

Before final administrative decisions were reached, NOW filed suit below under the FOIA against the Federal respondents, and against Prudential, Metropolitan, John Hancock and one other insurance company to compel disclosure of the requested documents.[4]

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[3] Prudential, Metropolitan and John Hancock all hold Government contracts and are therefore subject to the requirements of Executive Order 11246.

[4] The ICS informed Metropolitan that disclosure would take place without administrative review of Metropolitan's request for

Prudential, Metropolitan and John Hancock each asserted timely "reverse-FOIA" cross-claims against the Federal respondents seeking injunctive relief to prevent disclosure of their EEO-1 reports and other affirmative action materials either to NOW or to other members of the public.[5] Following generally adverse administrative determinations, the petitioners moved for preliminary injunctions to restrain release of the documents pending a full trial on the merits. After a hearing on these motions, the District Court, on December 6, 1976, issued a memorandum opinion and an order that permit, *inter alia,* the Federal respondents to release the insurance companies' EEO-1 reports and some portions of their affirmative action plans, on the theory that there was little or no probability that the insurance companies would ultimately be successful on the merits in view of the prior decisions—which the District Court had to consider controlling—of the U.S. Court of Appeals of the District of Columbia Circuit.

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confidentiality, which the ICS had received prior to NOW's request for disclosure. Metropolitan then filed suit in the Southern District of New York requesting declaratory and injunctive relief. NOW did not intervene in the New York action, Metropolitan v. Usery, 75 Civ. 4182, but instead chose to pursue the matter solely in the District of Columbia.

[5] The term "reverse FOIA" suits has been used in various lower court decisions and scholarly articles to describe actions in which a private party seeks judicial relief to prevent threatened disclosure under color of the FOIA. *See e.g.,* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976); Charles River Park "A", Inc. v. Department of H.U.D., 519 F.2d 935 (D.C. Cir. 1975); Note, *Protection From Government Disclosure—The Reverse—FOIA Suit,* 1976 Duke L.J. 330 (1976); Note, *Reverse-Freedom of Information Act Suit: Confidential Information in Search of Protection,* 70 Nw. U.L. Rev. 995 (1976).

EEO-1 reports are two-page Government-printed forms (a blank sample appears at Appendix F), which all large and moderate-sized employers are required to file for each of their facilities with 25 or more employees. Completed reports show, among other things, the number of employees in each of the nine standard job classifications at an employer's facility, broken down by sex and minority group classifications. For example, an employer's EEO-1 report would indicate for each facility the total number of technicians (one of the nine job categories) employed at the facility, and total males and total females in that category, Negro males and females, Oriental males and females, American Indian males and females, and Spanish-surnamed American males and females. In addition to an EEO-1 report on each facility, an employer must also submit a consolidated report providing a similar breakdown of its total workforce. Because they maintain many separate large and small facilities throughout the United States, the insurance company petitioners annually file hundreds of EEO-1 reports. Prudential, for example, annually files over 600 separate EEO-1 forms, all of which (for 1975) are encompassed by the NOW FOIA request. Every EEO-1 report, including those in question here, contains a legend at the bottom which states, "All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII." *See* Appendix F.

The EEOC requires that EEO-1 forms be filed annually by every employer with 100 or more employees, pursuant to its authority under Section 709(c) of the Civil Rights Act, 42 U.S.C. § 2000e-8(c). *See* 29 CFR § 1602.7 (1975). In addition, any employer with 50 or

more employees and a Government contract or subcontract amounting to $50,000 or more is required to file an EEO-1 report annually for each facility with the Department of Labor's OFCCP pursuant to its authority under Executive Order 11246. 41 CFR § 60-1.7 (1976).

The insurance company petitioners, both as Government contractors and as employers of more than 100 persons, are required to file EEO-1 reports under Section 709 of the Civil Rights Act and Executive Order 11246. However, since the EEO-1 report has a standard format developed by the EEOC and the OFCCP, petitioners are required to file only one set of EEO-1 reports each year with a single data processing service (the so-called "Joint Reporting Committee") [6] that in turn supplies copies of employers' EEO-1 reports to the EEOC and the OFCCP upon agency request. The various Executive Order compliance agencies subordinate to the OFCCP, such as the Insurance Compliance Staff, either can obtain EEO-1 reports directly from this data processing service or indirectly through the OFCCP.

In rejecting the insurance companies' arguments that their EEO-1 reports are exempt from mandatory disclosure under the (b)(3) exemption, the District Court relied principally on the District of Columbia Circuit's decision in *Sears, Roebuck & Co.* v. *General Services Admin.*, 509 F.2d 527 (D.C. Cir. 1974). The (b)(3) exemption provides that the FOIA does not apply to documents which are specifically exempted by

[6] As was pointed out by the plaintiff in Sears, Roebuck & Co. v. General Services Admin., 384 F. Supp. 996, 1002 (D.D.C. 1974) the "Joint Reporting Committee" is funded and largely staffed by the EEOC and thus appears to be an alter ego of the EEOC.

another statute. In *Sears,* the District of Columbia Circuit held that the (b)(3) exemption was unavailable in a situation almost identical to this case since the Court rejected the applicability of Section 709(e) of the Civil Rights Act and 44 U.S.C. § 3508 to the disclosure of EEO-1 reports by a compliance agency under Executive Order 11246. Although the District Court held that substantial portions of the petitioners' affirmative action plans are exempt from disclosure under the (b)(4) exemption, which protects confidential business information, it did not find sufficient evidence of competitive injury under the narrow reading by the Court of Appeals of the (b)(4) exemption to justify withholding the remainder of the affirmative action plans and the EEO-1 reports.

The petitioners also argued below that their EEO-1 reports and their affirmative action plans were protected from disclosure by the (b)(3) exemption's incorporation of 18 U.S.C. § 1905, which imposes criminal sanctions for unauthorized disclosure of confidential statistical data submitted to the Government.[7] The District Court, following what for it was the "controlling precedent" of the Court of Appeals decisions in the District of Columbia, rejected this argument on the theory that Section 1905 has no independent effect since it is no broader than the (b)(4) exemption. This result is directly contrary to the holding of the Fourth Circuit in *Westinghouse Elec. Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976).

[7] Metropolitan has raised in the Court of Appeals and raises here the applicability of 18 U.S.C. § 1905 to disclosure not only of its EEO-1 reports, but also of its affirmative action plans and portions of compliance review reports which are derived from Metropolitan's affirmative action plans.

REASONS FOR GRANTING THE WRIT

I. The Holding Below, as It Relates to the Incorporation Within the (b)(3) Exemption of Section 709(e) of the Civil Rights Act of 1964, and 44 U.S.C. § 3508, Presents Important and Recurring Questions of Statutory Construction and It Reaches a Result Expressly Questioned by a Justice of This Court.

This case warrants plenary review by this Court because it presents frequently recurring legal issues relating to the applicability under the FOIA's (b)(3) exemption of Section 709(e) of the Civil Rights Act of 1964 and 44 U.S.C. § 3508 to the contemplated disclosure of EEO-1 reports. This Court's guidance on these FOIA questions, which have broad applicability and public importance,[8] is sorely needed. That a serious question exists is demonstrated by the conflict between the result reached below and the views expressed by Mr. Justice Douglas on this question in *Chamber of Commerce* v. *Legal Aid Society*, 423 U.S. 1309 (1975).

Section 709(e) of the Civil Rights Act unquestionably prohibits officers and employees of one Federal agency—the EEOC—from disclosing EEO-1 reports since Section 709(e) prohibits disclosure of any information obtained by the Commission under its Section

[8] The number of FOIA cases, including FOIA cases involving affirmative action materials, is growing rapidly. While figures are not readily available on the total number of FOIA cases involving affirmative action materials, at least 15 of the cases cited herein involve FOIA-affirmative action *decisions* over the past two or three years. As for FOIA cases generally, 183 FOIA complaints were filed in the District of Columbia alone in 1976—a threefold increase as compared with 1975. *See* Weissman v. CIA, No. 76-1566, slip op. p. 11, fn. 11, (D.C. Cir., January 6, 1977). Moreover, while the national average rate of appeals is 9% for all cases, in the District of Columbia 30% of all closed FOIA cases result in appeals. *Ibid.*

709(c) power to compel recordkeeping and reporting by employers. 42 U.S.C. § 2000e-8(c) and 8 (e). Thus, it has been undisputed that the EEOC may not disclose EEO-1 reports, outside the use of the reports in EEO litigation. *See generally H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147, 1148-9 (5th Cir. 1973). It has also never been disputed that Section 709(e) was incorporated by the (b)(3) exemption to the FOIA, making EEO-1 reports exempt from mandatory disclosure by the EEOC.[9] Pursuant to 44 U.S.C. § 3508, the Section 709(e) restrictions on disclosure should remain applicable even though disclosure by another federal agency is proposed. *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970) *rev'd on other grounds*, 421 U.S. 168 (1975).

Therefore, in light of Section 709(e), 44 U.S.C. § 3508, and the (b)(3) exemption to the FOIA, the latter statute should not be interpreted as requiring disclosure of EEO-1 reports merely on the theory that some Government agency other than EEOC, such as the Insurance Compliance Staff or the Department of Labor, has been requested to make the disclosure. Although EEO-1 reports are not generally filed directly with the EEOC but with its data processing agent, the essential prerequisites of Section 709(e) and 44 U.S. § 3508 are satisfied. The EEO-1 reports were obtained pursuant to the EEOC's authority under Section 709 and they were obtained "in confidence." Con-

[9] Section 709(e) was among the statutes specifically identified as coming within the scope of the (b)(3) exemption by the U.S. Attorney General's authoritative and often cited memorandum on the FOIA. Attorney General's Memorandum on Public Information Section of the Administrative Procedure Act, June 1967, at p. 32.

sequently, even if Section 709(e) and 44 U.S.C. § 3508 do not require criminal prosecution for release of EEO-1 reports by non-EEOC employees, these statutory provisions nevertheless indicate an unmistakable congressional intent to protect EEO-1 reports from public dissemination—an intent which is frustrated by the unduly narrow interpretation of the Section 709 (e) and 44 U.S.C. § 3508 by the courts below.

In rejecting the applicability of Section 709(e) and 44 U.S.C. § 3508, the Federal courts in the District of Columbia in *Sears, Roebuck & Co.* v. *General Services Admin.*, 509 F.2d 527 (D.C. Cir. 1974) and similar cases,[10] have relied on the fact that the EEO-1 reports were not collected or released directly by the EEOC, but rather by the "Joint Reporting Committee,"—the EEOC-funded data processing service that physically handles the processing of the reports. Since 709(e) is a criminal statute, the Circuit Court in *Sears* felt compelled to so narrowly construe its meaning as to obscure totally the legislative intent behind the provision. This formalistic approach, based on blind reliance on a canon of construction, leads to the anomaly of one agency of the Government being compelled to release a standard form document while officials of a sister agency are subject to criminal penalties if they release the very same document.

The dual reporting requirements of the EEOC and OFCCP should not obscure the fact that the insurance company petitioners and other large employers must

[10] *E.g.*, Goodyear Tire & Rubber Co. v. Dunlop, 13 FEP Cases 1734 (D.D.C. 1975); Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975); Sears, Roebuck & Co. v. General Services Admin., 402 F. Supp. 378 (D.D.C. 1975).

file EEO-1 reports even if they hold no Government contracts; thus, Section 709(e) by its express terms is applicable to the EEO-1 reports that these employers (who happen also to be contractors) file annually. When it originally enacted and later amended Section 709, giving the EEOC information-gathering authority, Congress clearly intended that the EEOC should coordinate its information gathering with other agencies such as the OFCCP.[11] However, in encouraging coordinated reporting functions to avoid duplication, certainly Congress did not intend for such coordination to become a means of circumventing the disclosure prohibitions of Section 709(e) and 44 U.S.C. § 3508.[12] Indeed, a desire to encourage coordination,

[11] In an interpretative memorandum on Title VII that Senators Clark and Case, the Senate floor managers, introduced into the record as part of the Senate debates on the 1964 Civil Rights Act, the possibility of coordinating federal reporting requirements was offered to assuage fears that EEOC reporting might prove onerous:

> "Any recordkeeping requirements imposed by the Commission could be worked into existing requirements and practices so as to result in a minimum additional burden. Furthermore, the Federal Reports Act of 1942, 5 United States Code 139-139f, gives the Director of the Bureau of the Budget authority to coordinate the information-gathering activities of Federal agencies, and he can refuse to approve a general recordkeeping or reporting requirement which is too onerous or poorly coordinated with other requirements." 110 Cong. Rec. 7214 (1964).

Coordination of recording requirement was made mandatory by the 1972 Amendment to the Civil Rights Act when the following sentence was inserted as part of Section 709(d):

> "In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies." 42 U.S.C. § 2000e-8(d) (1974).

[12] Indeed, in 1972 when Congress provided the EEOC with the authority to furnish information to State and local equal employ-

especially coordination that leads to the use of common reporting forms, is utterly *inconsistent* with the notion of permitting the right hand of government to do that which the left hand is expressly forbidden from doing. Whether Section 709(e) is viewed as a means of serving the government's interest in encouraging the free flow of information to the government or protecting the interests of private parties in the confidentiality of their affairs, it is clear that the purpose of Section 709(e) is thwarted when disclosure is allowed, and indeed compelled, depending on the fortuitous circumstance of which agency of government is asked to yield the documents.

Subsequent to *Sears,* acting on a stay request in *Chamber of Commerce* v. *Legal Aid Society,* 423 U.S. 1309 (1975), Mr. Justice Douglas considered this very question and expressed grave doubts as to the narrow construction of Section 709(e) adopted in *Sears* and followed in the instant case:

> " . . . information contained in the EEO-1's, the AAP's and the CRR's which are prepared from the EEO-1's, is arguably protected from disclosure by § 709(e). See *H. Kessler & Co.* v. *EEOC,* 472 F. 2d 1147, 1152, 1153 (CA 5 1973) (en banc) (majority and dissenting opinions.
>
> To be sure, the information in the AAP's and the EEO-1's in this case was not obtained directly by the EEOC. Rather, the information was apparently collected by a Joint Reporting Committee of

ment opportunity agencies it was made clear this information was not to be disseminated by such recipients:

> "Such information shall be furnished on the condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information." 42 U.S.C. § 2000e-8(d) (1974).

In the case of information shared with other Federal agencies, 44 U.S.C. § 3508 made this kind of explicit condition unnecessary.

> both the EEOC and the federal compliance agency (in this case, GSA) under Executive Order No. 11246. But the information in the EEO-1's was obtained, in part, on behalf of the EEOC, see 41 CFR § 60-1.7(a)(1), and much of the information contained in the AAP's is essentially in the nature of that protected by § 709. Compare 41 CFR pt. 60-2 with 42 U.S.C. § 2000(e)-8(c) (1970 ed., Supp. III). Indeed, certain policy considerations underlying the regulations precluding release by the GSA of information contained in the AAP's are akin to those motivating the confidentiality implemented by § 709. Compare 41 CFR § 60-40.3 (a)(5) with *H. Kessler & Co., supra,* at 1150. In view of the foregoing, though some of the information involved here neither was obtained, nor is to be disclosed, by the EEOC, *the congressional purpose of confidentiality, protected by criminal sanctions, is not to be lightly circumvented."* 423 U.S. at 1311-13 [13] (emphasis added).

Contrary to this cogent reasoning, the Court of Appeals below will not even stay disclosure pending a full hearing on the merits of the Section 709(e) issue.

The precise FOIA disclosure issues posed by this case have in recent years produced countless administrative determinations by agencies to which FOIA requests have been addressed and also a large number

[13] Mr. Justice Douglas went on to deny the stay because the disclosure about to occur was in a pretrial discovery context and was subject to protective orders which mitigated, if they did not completely preclude, any irreparable injury to the party resisting disclosure. In the instant case, there is no comparable qualification or limitation on the disclosure which the Federal respondents propose to make and upon which NOW insists.

of sometimes conflicting court decisions.[14] Indeed, a substantial share of lower court FOIA jurisprudence has emerged from cases involving threatened disclosure of EEO-1 reports. The frequency with which the issues presented here have been litigated in the lower court underscores their broad public importance not only to the multitude of companies which must submit EEO-1 reports to a myriad of Federal agencies but also the Governmental custodians of such documents and to private parties who wish to have access to such documents.

Even though this case arises in the context of a FOIA request made to the Insurance Compliance Staff of the Social Security Administration of HEW, the decision will have equal applicability to disclosure of EEO-1 reports by any of the other Executive Order 11246 compliance agencies that collectively control the

[14] *See e.g.*, Legal Aid Society v. Chamber of Commerce, 423 U.S. 1309 (1975); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976); Sears, Roebuck & Co. v. General Services Admin., 509 F.2d 527 (D.C. Cir. 1974); Crown Central Petroleum Corp. v. Kleppe, 14 FEP Cases 49 (D.Md. 1976); Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976); Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (D. Del. 1976); Goodyear Tire & Rubber Co. v. Dunlop, 13 FEP Cases 1734 (D.D.C. 1975); Sears, Roebuck & Co. v. General Services Admin., 402 F. Supp. 378 (D.D.C. 1975); Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975); Legal Aid Society v. Brennan, 13 FEP Cases 860 (N.D. Cal. 1975); Sears, Roebuck & Co. v. General Services Admin., 384 F. Supp. 996 (D.D.C. 1974); Hughes Aircraft Co. v. Schlesinger, 804 F. Supp. 292 (C.D. Cal. 1974); The Lawyers Cooperative Publishing Co. v. Schlesinger, No. 1974-212 (W.D.N.Y. July 3, 1974); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974); Legal Aid Society v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972).

reports of government contractors in all segments of American industry.[15] It has been estimated that there are over 275,000 employers subject to Executive Order 11246 jurisdiction, and a very substantial portion of those employers are required to file EEO-1 reports annually.[16] The decisions below and others like it directly affect each of these reporting contractors since by holding that EEO-1 reports are subject to mandatory disclosure under the FOIA, these decisions allow

[15] The 17 Federal departments, agencies or authorities which have been designated by the Director of the OFCCP to perform certain compliance functions under Executive Order 11246 are:

1. Department of Agriculture (USDA)
2. Energy Research Development Administration (ERDA)
3. Department of Commerce
4. Department of Defense (DOD)
5. Environmental Protection Agency (EPA)
6. General Services Administration (GSA)
7. Department of Health, Education and Welfare (HEW)
8. Department of Interior
9. Department of Housing and Urban Development (HUD)
10. Department of Justice
11. United States Postal Service (USPS)
12. Small Business Administration (SBA)
13. Tennessee Valley Authority (TVA)
14. Department of Transportation (DOT)
15. Department of Treasury
16. Veterans Administration (VA)
17. National Aeronautics and Space Administration (NASA)

OFCCP Compliance Manual, Section 2-202.

Any of these entities may receive FOIA requests for EEO-1 reports.

[16] The Department of Labor has estimated that there are more than 275,000 Federal nonconstruction contractors subject to its Executive Order 11246 and that number would be even higher if Federal construction contractors were included. Approximately 92,000 of the nonconstruction Contractors file EEO-1 reports. *See* General Accounting Office Report, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved," GAO MWD-75-63, at 31-32 (April 29, 1975).

anyone from the well-intentioned public citizen to the unscrupulous competitor to have ready access to the detailed information on an employer's staffing at each of its facilities.[17] Clearly the Section 709(e) issue has sufficiently broad applicability and importance to merit resolution by this Court.

II. The Holding Below, as It Relates to the Incorporation Within the (b)(3) Exemption of 18 U.S.C. § 1905, and Similar Rulings of the Court of Appeals for the District of Columbia Circuit Are in Direct Conflict with a Recent Decision of the Court of Appeals for the Fourth Circuit.

There is a clear conflict between the Courts of Appeals for the District of Columbia and the Fourth Circuits on whether the (b)(3) exemption in the FOIA incorporates 18 U.S.C. § 1905, and this conflict presents a compelling reason for review by this Court. *E.g.,* Rule 19(1)(b) of the Supreme Court Rules; *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 559 (1968).

In several decisions that have considered the relationship of 18 U.S.C. § 1905 to the FOIA, the Court of Appeals for the District of Columbia Circuit has held

[17] Several agencies that have made studies of the FOIA requests they receive indicate that the majority of such requests are initiated by corporations or law firms on behalf of corporate clients. FDA Commissioner Alexander Schmidt has charged that such FOIA requests support "industrial espionage—companies seeking information about competitors—and not the public's right to know." Lardner, *Use, Abuse of Freedom of Information Act,* Washington Post, July 27, 1976, at A4; *See also* Silfrin, *Official Claims Lawyers Misuse Information Act,* Washington Post, January 28, 1977 at D7.

that 18 U.S.C. § 1905 is *not* a statute incorporated by the (b) (3) exemption to the FOIA.[18] In the instant case, the District Court felt obliged to follow that line of cases and the Court of Appeals, in denying petitioners' motions for stay, evidenced a complete unwillingness to reexamine the issue. Appendix A at 8a-9a, Appendix C at 45a and Appendix D at 49a.

But just four months ago, the Court of Appeals for the Fourth Circuit, in *Westinghouse Elec. Corp.* v. *Schlesinger,* 542 F.2d 1190, 1199-1203 (4th Cir. 1976), took what the trial court euphemistically described below as "a somewhat different approach to the applicability of § 1905." Appendix A at 10a. In fact, after a careful review of the District of Columbia Circuit decisions dealing with interrelationship of 18 U.S.C. § 1905 and the (b)(3) exemption, the Court of Appeals for the Fourth Circuit expressly rejected the approach followed in the District of Columbia Circuit. The Fourth Circuit held that Section 1905 had *not* been modified by enactment of the FOIA, and it had been intended by Congress to be among the statutes incorporated by FOIA's (b)(3) exemption. 542 F.2d at 1202-1203. In reaching this conclusion, the Fourth Circuit was persuaded in part by the legislative history of

[18] National Parks & Conservation Ass'n. v. Kleppe, No. 76-1044 (D.C. Cir. November 15, 1976); Charles River Park "A", Inc. v. Department of H.U.D., 519 F.2d 935, 941, n.7 (D.C. Cir. 1975); Sears, Roebuck & Co. v. General Services Admin., 509 F.2d 527, 529 (D.C. Cir. 1974); Robertson v. Butterfield, 498 F.2d 1031, 1033, n.6 (D.C. Cir. 1974) *rev'd on other grounds,* 422 U.S. 255 (1975); Grumman Aireraft Engineering Corp. v. Renegotiation Bd., 425 F.2d 578, 589, n.5 (D.C. Cir. 1970) *rev'd on other grounds,* 421 U.S. 168 (1975); *see also* Robertson v. Department of Defense, 402 F. Supp. 1342, 1347-8 (D.D.C. 1975); Ditlow v. Volpe, 362 F. Supp. 1321, 1323-4 (D.D.C. 1973), *rev'd on other grounds,* 494 F.2d 1073 (D.C. Cir.), *cert. denied,* 419 U.S. 974 (1974).

the FOIA indicating an intent to preserve independent statutory protections from disclosure, such as 18 U.S.C. § 1905, which were already part of federal law:

> "There are nearly 100 statutes or parts of statutes which restrict public access to specific government records. *These would not be modified by the public provisions of S. 1160.*" (emphasis added H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

The Fourth Circuit Court of Appeals also noted that Section 1905 had previously been identified in a Congressional hearing as a statute which prohibited disclosure and that it was among the statutes listed by the Attorney General in his memorandum opinion on the scope and application of the FOIA as one of the statutes incorporated by the (b)(3) exemption.[19] The Fourth Circuit's decision in *Westinghouse* has been followed in a recent District Court decision in the Sixth Circuit. *Holiday Inns, Inc.* v. *Kleppe,* 13 FEP Cases 1337 (W.D. Tenn. 1976).

Following the decision of this Court in *FAA Administrator* v. *Robertson,* 422 U.S. 255 (1975), the (b)(3) exemption was amended, effective March 13, 1977, by the "Government in the Sunshine Act," P.L. 94-409, 90 Stat. 1241 (September 13, 1976). As amended, the (b)(3) exemption reads as follows:

> "(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

[19] *See Hearings on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 85th Cong., 2d Sess. 935-987 (1958); Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act, June 1967, at pp. 31-32.

This amendment, although designed to overrule the precise result reached in *Robertson,* does not resolve or render moot the conflict among the Circuits over the question whether 18 U.S.C. § 1905 is incorporated in the (b)(3) exemption. In *Robertson* this Court did not address the 18 U.S.C. § 1905 question but rather considered whether a quite different statute, Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504, was incorporated in the (b)(3) exemption. Section 1104 gives the FAA administrator *discretionary* authority to withhold "information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or Administrator pursuant to the provisions of this chapter." By contrast, 18 U.S.C. § 1905 is a criminal statute and obviously has no discretionary element. Moreover it refers to particular types of matters to be withheld, specifically:

> "information [which] concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . ."

Since Section 1905 plainly does not provide any discretion to disclose documents which fall within its scope, it satisfies proviso (A) of the amended (b)(3) exemption.[20] Accordingly, although Section 1104 of the

[20] A recent lower court decision considering the new version of the (b)(3) exemption found its two provisos clearly disjunctive.

Federal Aviation Act of 1958 will no longer be incorporated within the (b)(3) exemption, the same cannot be said of 18 U.S.C. § 1905.[21] Thus, the revision of the

Irons v. Gottschalk, No. 74-1365, slip. op. at 5, n. 3. (D.C. Cir. October 21, 1976). Thus any statute, such as § 1905, falling within the proviso (A) because of the absence of a discretionary element would still remain within the (b)(3) exemption. In determining whether 18 U.S.C. § 1905 is incorporated in the new version of the (b)(3) exemption, it therefore is unnecessary to consider whether § 1905 also satisfies proviso (B), although petitioners believe that it clearly satisfies that test also.

[21] To be sure the House Report on the Sunshine Act suggests that 18 U.S.C. § 1905 would fall outside the *House version* of the revised (b)(3) exemption, apparently concurring with the District of Columbia Circuit's views on the applicability of Section 1905 under the old (b)(3) exemption. H.R. Rep. No. 880, 94th Cong., 2d Sess., Part I, 10 (1976). Nevertheless, this Report does not clearly indicate that the House was attempting to *codify* the District of Columbia Circuit's view into an amended (b)(3) exemption. More importantly, *the House amendment to the (b)(3) exemption was not adopted.* The H.R. 11656 version of the (b)(3) amendment before the Committee when the House Report was prepared would have revised the (b)(3) exemption to read as follows:

> (b) Section 552(b)(3) of Title 5, United States Code, is amended to read as follows:
>
> > "(3) required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;".

There is little point in speculating whether this language, if it had become law, would have removed 18 U.S.C. § 1905 from the scope of the (b)(3) exemption. The House amendment was rejected in conference in favor of the conference substitute that was thereafter enacted into law in P.L. 94-409. Thus, the statements in the House Report are thoroughly unreliable indicia of the Congressional intent behind the quite different amendment to (b)(3) that was actually adopted.

The Conference Report on the Sunshine Act, which is the only authoritative statement of the intent of the revision of the (b)(3) exemption that the Congress adopted, states:

> "Section 5(b) of the conference substitute amends the third exemption in 5 U.S.C. 552(b) to include information specifically exempted from disclosure by statute (other than new

(b)(3) exemption does not moot the sharp conflict between circuits over the applicability of Section 1905 and there remains a pressing need for review by this Court.

The question whether 18 U.S.C. § 1905 is incorporated in the FOIA's (b)(3) exemption in fact has the broad public significance which calls for the authoritative resolution that only this Court can provide. It is a question which affects not only the disclosability of equal employment data provided to the Government (both EEO-1 reports and related materials such as affirmative action plans) but also a host of other materials including commercial and proprietary data in

> section 552b), if the statute either (a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (59 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306)."
>
> Sen. Conf. R. No. 94-1178, 94th Cong., 2d Sess. 24-25 (1976).

Both Section 1104 of the Aviation Act and Section 1106 of the Social Security Act, which the conference report cites as illustrations of the type of provision which will be excluded by the amended (b)(3) exemption, are statutes that provide the agency concerned with broad discretion in making disclosure decisions, but at the same time do not identify particular types of documents to be withheld or standards for withhholding. *See* Robertson v. Butterfield, 498 F.2d 1031 (D.C. Cir. 1974) (construing Section 1104 of the Aviation Act); Schecter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974) (construing section 1106 of the Social Security Act). Thus, there is nothing in the Conference Report which in any way suggests an intent to affect a statute, such as 18 U.S.C. § 1905, which clearly meets one and probably both of the provisos of the amended (b)(3) exemption.

Government contract bids, general information of the type that might be provided in response to Labor Department or Commerce Department surveys, and generally the wide spectrum of information found in the multitude of documents which private parties are asked or compelled under one statute or another to supply to the Federal Government. And it is not surprising that conflict exists not merely between the decisions of the Court of Appeals of the District of Columbia and the Fourth Circuits but also between several decisions in each circuit and is spreading to other circuits as the issue arises repeatedly. *See e.g., Holiday Inns, Inc.* v. *Kleppe, supra,* n.14; *Crown Central Petroleum Corp.* v. *Kleppe, supra,* n.14.

Some commentators have suggested that perhaps the issue is of little practical significance because the (b)(4) exemption contains language comparable to 18 18 U.S.C. § 1905 so that any protection for confidentiality which the (b)(3) exemption provides by reason of incorporation of § 1905 is redundant.[22] But this is not the case, as the decision below amply illustrates. At least in the District of Columbia, the lower courts have erected a significant barrier to successful invocation of the (b)(4) exemption. Thus, although in theory it should protect *all* confidential and privileged commercial and financial information, in the District of Columbia the (b)(4) exemption is not available in the absence of evidentiary proof that the party resisting disclosure would suffer *substantial* harm to its *competitive* position. *See e.g., Charles River Park, supra.*[23] The mere existence of the (b)(4) exemption, therefore, does not in any way lessen the critical need for an authoritative resolution of the (b)(3) question.

[22] The (b)(4) exemption provides:

"(b) This section does not apply to matters that are——

• • •

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;"

III. There is a Compelling Need for Issuance of a Writ of Certiorari Before Judgment Since this is the Only Way Petitioners May Obtain Meaningful Review by This Court Before Disclosure of the Specific Documents at Issue Occurs and Since This Court will then have an Opportunity To Review Simultaneously Conflicting Decisions from Different Circuit Courts.

Under Rule 20 a writ of certiorari before judgment is plainly an extraordinary procedure. But this case raises what we believe to be an extraordinary situation that fully justifies invoking that procedure.

The adamant insistence of the Court of Appeals for the District of Columbia Circuit on its highly mechanical approach to the (b)(3) exemption has created a situation which cannot help but be destructive of the possibility of meaningful judicial review of issues such as those presented by this case. Repeated refusals by the Court of Appeals, as have occurred, even to enter a stay order to preserve the status quo pending a preliminary determination by this Court will inevitably encourage unseemly forum shopping and courthouse races in

[23] Extending this barrier to invocation of the (b)(4) exemption to its logical absurdity, the Court of Appeals for the District of Columbia Circuit seems to take the position that one who has a monopoly is by definition not "in competition" and therefore has no right under the (b)(4) exemption to confidentiality for *anything*, even highly personal financial data. *See* National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); National Parks & Conservation. Ass'n v. Kleppe, No. 76-1044 (D.C. Cir. November 15, 1976) (suggesting that the rights to confidential treatment of financial data of U.S. Park concessionaires will depend on whether the concessionaires are located near competing outlets).

FOIA cases. Those seeking to compel disclosure will rush to the District of Columbia secure in the knowledge that, absent a stay order by this Court, an irrevocable disclosure of their documents can be expected before briefing or argument on the merits in the Court of Appeals, and before this Court could have an opportunity to review the merits in the normal fashion. Conversely, those seeking to avail themselves of FOIA exemptions will be forced to race to federal courts outside the District of Columbia in order to be accorded an opportunity for the judicial review to which they are entitled before the confidentiality of their documents is irretrievably lost.

While courthouse races are unfortunate and, standing alone, constitute one of the underlying reasons for resolving conflicts among Courts of Appeals, here the problem is compounded because in the District of Columbia one of two conflicting views becomes, as a practical matter, an ultimate rule of law. In each case the issue is irreversably resolved, at least as to the specific documents in question, by a denial of a stay pending appeal. Accordingly, petitioners urge that this case involves sufficient public importance to warrant granting of a writ of certiorari before judgment.

This Court frequently grants certiorari before judgment in situations where similar or identical issues were already before the Court in another case, *E.g., United States* v. *Thomas,* 361 U.S. 950 (1960); *Bolling* v. *Sharpe,* 344 U.S. 873 (1952). It is quite likely that *Westinghouse, supra,* which obviously involves several issues identical to the issues the petitioners seek to raise in the instant case, will be before the Court on petition for certiorari shortly. The Government, which has expressed concern about the Fourth Circuit holding relating to 18 U.S.C. § 1905, has requested in *Westinghouse* an extension of time until February 27, 1977, within which to file a petition for writ of certiorari. While the petitioners cannot be certain at this time that a petition will be filed in *Westinghouse,* it seems likely that this will occur. Since there is a clear conflict between Courts of Appeals, there would be little reason for granting certiorari in one case and not the other. Here, both cases can be considered simultaneously only by taking up the instant case on certiorari before judgment.

Finally, one of the primary reasons (if not *the* primary reason) for the quite sparing use of certiorari before judgment is that this Court wishes to have the benefit of the views of the lower court before considering the issues. Here, however, the Court of Appeals for the District of Columbia Circuit has already addressed the legal issues raised by this petition, in *Sears* and other cases cited above, the Court of Appeals for the Fourth Circuit has issued an extensive opinion in *Westinghouse* addressing the same legal issues, and the lower Court's denial of any stay herein suggests that at least two members of the lower court see no need, despite *Westinghouse,* to reexamine the resolution of the legal issues reached in *Sears.* In view of these facts the absence of a full opinion by the Court of Appeals below in this particular case does not weigh heavily against granting the petition.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEROME ACKERMAN
MICHAEL S. HORNE
RODERICK A. DEARMENT
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Petitioner, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Petitioner, John Hancock Mutual Life Insurance Company

January 31, 1977

APPENDIX

APPENDIX A

As Amended by the District Court's Order of December 14, 1976, Which Is Appended Hereto

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0914

METROPOLITAN LIFE INSURANCE COMPANY, *Plaintiff*,

v.

W. J. USERY, ET AL., *Defendants*.

Civil Action No. 76-0087

NATIONAL ORGANIZATION FOR WOMEN, *Plaintiff*,

v.

SOCIAL SECURITY ADMINISTRATION, ET AL., *Defendants*.

Memorandum

In this action three insurance companies, the John Hancock Mutual Life Insurance Company ("John Hancock"), the Metropolitan Life Insurance Company ("Metropolitan"), and the Prudential Life Insurance Company of America ("Prudential"), seek to prevent the disclosure to the District of Columbia Chapter of the National Organization for Women ("D.C. NOW") of certain EEO-1 forms and affirmative action plans ("AAPs") submitted by the companies to the Insurance Compliance Staff of the Social Security Administration ("ICS") and the Office of Federal Contract Compliance ("OFCC") pursuant to Executive Order 11246, as amended by Executive Order 11375, and 41 C.F.R. § 60-2.1 *et seq.* and 41 C.F.R. 60-60.1

et seq.[1] The companies also seek to prevent the disclosure of certain Compliance Review Reports ("CRR") compiled by the ICS. This Freedom of Information Act ("FOIA") case is before this Court in a reverse posture. Unlike the typical FOIA action in which a party seeks to force the government to disclose information, in a reverse FOIA action, a party who has submitted information to a government agency seeks to prevent the agency from disclosing information to a third party pursuant to a FOIA, 5 U.S.C. § 552(a), request.

As government contractors, each of these insurance companies are required, pursuant to the above Executive Orders and regulations, to file annually an EEO-1 for its entire domestic operation and a separate EEO-1 for each individual domestic facility and office. These reports contain summary data on the number of women and minority group members employed by the company. The AAPs which the companies are also required to prepare provide much more extensive and detailed information on the past and projected employment of women and minority group members by the company. The AAPs are made available to the ICS only when the ICS conducts a compliance review of a particular facility.[2] The ICS periodically conducts such reviews of the companies subject to its jurisdiction and thereafter compiles a CRR which may incorporate portions of the AAPs.

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[1] The Secretary of Labor, who has the overall responsibility for enforcing the affirmative action requirements to which federal contractors are subjected, has delegated this authority to the Department of Labor's Director of the OFCC. The OFCC has in turn designated various federal agencies as "compliance agencies" which review and rule in the first instance on the adequacy of a contractor's affirmative action program and efforts. The ICS, a division of the Social Security Administration, is the compliance agency for the insurance industry.

[2] The scheduling of compliance reviews is governed by 41 C.F.R. § 60-60.3.

On August 9, 1975, D.C. NOW made a FOIA request to the ICS for all current EEO-1s, AAPs, and CRRs [3] filed by or relating to the three insurance companies parties to this action and the Equitable Life Assurance Society of the United States.[4] Upon being informed by the ICS of D.C. NOW's request, the insurance companies objected to its disclosure, arguing that the documents were exempted under sections (b)(3), (4), (6), and (7) of the Act's exemptions. The ICS rejected most of the companies' contentions.[5] The companies then appealed to the OFCC pursuant to the provisions of 41 C.F.R. § 60-60.4(d). On July 19, 1976, the OFCC substantially affirmed the ICS's decision. It determined to disclose the EEO-1s and substantial portions of the AAPs and CRRs. Wage and salary information, the names, social security numbers, employee identification numbers, and "other identifying information," comments revealing the closing or reorganization

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[3] Specifically, D.C. NOW requested only the EEO-1s, AAPs, and CRRs for 1975 on file with the ICS. Since AAPs are submitted to the ICS only when a compliance review of a particular facility is undertaken, substantially less than all of the companies' AAPs were on file at the time of the request.

[4] The equitable Life Assurance Society of the United States withdrew its objections to disclosure of its EEO-1s, AAPs, and CRRs after the ICS issued its decision. See letter from Werner Weinstock to ICS, dated February 11, 1976, Attachment 1 to D.C. NOW's Memorandum in Opposition to Application by Insurance Company Defendants for Temporary Restraining Order.

[5] The ICS determined that most of the information contained in the documents was subject to mandatory disclosure under the FOIA. See letter from Everett Friedman, Chief of the ICS, to Herbert Watchell, dated February 4, 1976, Exhibit F attached to Metropolitan's Application for a Temporary Restraining Order, filed July 19, 1976; letter from Everett Friedman to Robert Loeffler, dated February 4, 1976, Exhibit I attached to Prudential's Application for a Temporary Restraining Order, filed July 19, 1976; and letter of Everett Friedman to Milton Corey, dated February 4, 1976, Exhibit 2 attached to D.C. NOW's Motion For a Preliminary Injunction, filed February, 1976.

of a unit or units not already publicly disclosed, and training data revealing entry into a new market were deleted.[6]

While the administrative appeal was pending, the two suits which have been consolidated in this action[7] were brought. On August 22, 1975, Metropolitan initiated litigation in the Southern District of New York to enjoin release to D.C. NOW of its EEO-1s, AAPs, and CRRs. This action was subsequently transferred to this Court. On January 16, 1976, D.C. NOW filed an action pursuant to the FOIA, 5 U.S.C. § 552, to compel disclosure of the documents which were the subject of its August 9, 1975 request to the ICS. This Court stayed judicial proceedings in this suit pending the final agency decision.

On July 19, 1976, the insurance companies applied for a temporary restraining order to enjoin the release of the documents subject to D.C. NOW's August 9, 1975 request pending a hearing on a motion for preliminary injunction. After a hearing, this Court granted the companies' motion for a temporary restraining order.

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[6] See letter from Lawrence Z. Lorber, Deputy Assistant Secretary and Director, OFCC, to Robert Loeffler, dated July 13, 1976, Exhibit Q attached to Prudential's Application for a Temporary Restraining Order, filed July 19, 1976; letter from Lawrence Z. Lorber to William F. Joy, dated July 13, 1976; and letter from Lawrence Z. Lorber to John Creedon, dated July 13, 1976, Exhibit I attached to Metropolitan's Application for a Temporary Restraining Order, filed July 19, 1976. These letters reveal that the OFCC based its decision to disclose the documents on a determination that none of the exemptions to the FOIA relied upon by the companies were applicable.

[7] *National Organization for Women, Washington, D. C. Chapter* v. *Social Security Administration of the Department of Health, Education and Welfare, et al.*, Civil Action No. 76-0087 (D.D.C. 1976), and *Metropolitan Life Insurance Company* v. *Usery, et al.*, Civil Action No. 76-914 (D.D.C. 1976). The federal agencies and officials who are the defendants in these actions are frequently referred to hereinafter as the "federal defendants."

This action is now before this Court on the insurance companies' motion for a preliminary injunction.[8] The companies seek to enjoin the release by the agency of any of the EEO-1s, AAPs, and CRRs which are the subject of D.C. NOW's August 9, 1975 request to the ICS. Alternatively, if this Court is unwilling to enjoin the release of all of the foregoing material, Prudential seeks a preliminary injunction protecting certain portions of the documents.[9] The companies take the position that the documents are exempt from mandatory disclosure under the Act by virtue of exemptions (b)(3), (4), (6), and (7) of the Act, 5 U.S.C. §§ 552(b)(3), (4), (6) and (7), and that the agency abused its discretion in deciding to disclose the documents.[10] The companies have met the well-recognized

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[8] The Court held evidentiary hearings on this matter on September 8, 10, 13 and 14, and the parties have submitted numerous memoranda, affidavits, exhibits, and proposed findings of fact and conclusions of law.

[9] Specifically, Prudential seeks, in the alternative, a preliminary injunction protecting: 1) its DAPs; 2) the work force analyses, job group analyses and personnel practices analyses contained in its utilization analysis in its AAPs; 3) the Identification of Problem Areas in its AAPs; 4) the Statement of Goals and Timetables contained in its AAPs; and 5) any portions of its CRRs which consist of attachments of Prudential documents containing the above information.

Although only Prudential has specifically made such an alternative motion, this Court is obligated under the Act to consider on a page-by-page basis what, if any, of the information contained in the documents is subject to mandatory disclosure and what, if any, of the information comes within an exemption. Therefore, the Court has not limited its consideration to whether an injunction protecting all of the information in the documents submitted by the companies is warranted or not for any of the companies. Instead, the Court has examined each of the companies' documents on a page-by-page basis to make the required determinations.

[10] Only Prudential, of the three insurance companies, has addressed the question of whether the determination to disclose the exempt information constituted an abuse of the agency's discretion

standards for preliminary injunctive relief outlined by this Circuit in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), with respect to certain data contained in the AAPs and those portions of the CRRs which incorporate this data. Specifically, this Court has determined that the insurance companies are entitled to preliminary injunctive relief as to the disclosure of the work force analyses, the department lists, the statistical and narrative data on projected promotions, the reasons for termination contained in certain termination tables, and certain narrative comments concerning performance evaluations or preferences or comments of employees contained in the AAPs and any portions of the CRRs which incorporate this data. The companies have not met the standards for preliminary injunctive relief with respect to the disclosure of the EEO-1s or any of the other data contained in the AAPs and CRRs.[11]

Jurisdiction and Standard of Review

The parties do not dispute this Court's jurisdiction over the matter. This Court has jurisdiction to review the agency's decision under the administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; *Pickus* v. *United States Board of Parole*, 507 F.2d 1107, 1110 (D.C. Cir. 1974); *Charles River Park "A", Inc.* v. *H.U.D.*, 519 F.2d 935, 939 (D.C. Cir. 1975).

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in any depth. The Court has, however, considered this question with respect to the documents of all three of the insurance companies.

[11] D.C. NOW urges that Metropolitan and Prudential have waived certain objections because of the position they took at the administrative level and, with respect to Prudential, because of the position it took in the temporary restraining order proceeding. The Court is unpersuaded by these claims. Even assuming such a waiver did occur, it is not relevant in light of the Court's view of the merits.

The parties are in dispute as to the appropriate standard of review in a reverse-FOIA case. The federal government and D.C. NOW argue that the Court is limited to reviewing the agency's decision, on the basis of the agency record, for an abuse of discretion.[12] The insurance companies contend that they are entitled to *de novo* review in this Court. To some extent, both positions have merit.

In a reverse-FOIA case the threshold question is whether the documents sought are subject to mandatory disclosure or fall within an exemption to the Act. If the documents sought are subject to mandatory disclosure, the lawsuit is at an end. If the documents, or portions thereof, fall within an exemption to mandatory disclosure, the Act does not apply and the agency's decision to disclose the documents is subject to reversal only for an abuse of discretion. *Charles River Park "A", Inc.* v. *H.U.D., supra,* at 941-42. In determining whether any exemptions apply to the information which the agency intends to disclose, the Court is not confined to reviewing the agency record. Even under APA review, the Court must hold a hearing and determine *de novo* whether an exemption applies just as if the suit were one brought to compel disclosure. *Id.* at 940 n. 4. However, in determining whether the agency abused its discretion in deciding to disclose the information, the Court must only review the administrative record. *Id.* at 943.

Merits

The parties have submitted numerous EEO-1s and AAPs, which they have stipulated to be representative of the documents which are the subject of this action, to the Court. No CRRs were submitted. After reviewing the documents on a page-by-page basis to determine what, if any, of the information falls within an exemption to the Act,

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[12] They argue that the evidence adduced at the oral hearing and the affidavits are relevant only to the question of irreparable injury.

the Court is of the opinion that there is a substantial likelihood that certain portions of the AAPs fall within the ambit of the (d)(4) and (b)(6) exemptions. To the extent that the CRRs incorporate portions of the AAPs [13] which the Court has determined to be exempt, those portions of the CRRs are also likely to fall within these exemptions. The EEO-1s do not come within either the (b)(4) or (b)(6) exemption. Neither the (b)(3) nor (b)(7) exemption is applicable to the EEO-1s, AAPs and CRRs.

Exemption (b)(3)

This exemption applies to documents "specifically exempted from disclosure by statute." The insurance companies rely on these exemption statutes: § 709(e) of the Civil Rights Act, 42 U.S.C. § 2000e-8(e); 44 U.S.C. § 3508 and 18 U.S.C. § 1905.

Section 709(e) of the Civil Rights Act concerns the disclosure of information collected by the Equal Employment Opportunity Commission (EEOC) pursuant to its authority under § 709 of the Civil Rights Act by employees or officers of the EEOC. The documents involved in the instant action were collected by the ICS, not the EEOC. The contentions put forth by the insurance companies to circumvent this hurdle to the applicability of § 709(e) are lacking in merit. The courts which have considered the question of the applicability of § 709(e) to EEO-1s, AAPs, and CRRs have uniformly rejected such arguments and held that § 709(e) is not applicable to these documents. *See Sears, Roebuck and Co.* v. *General Services Administration,* 509 F.2d 527 (D.C. Cir. 1974); *Goodyear Tire and*

[13] Although no CRRs were submitted to the Court for its inspection, all parties have represented that the CRRs may contain portions of the AAPs. Should the parties not be able to agree as to the extent to which the CRRs incorporate exempt portions of the AAPs, representative CRRs will have to be submitted to the Court at that time.

Rubber Co. v. *Dunlop,* C.A. No. 75-1828 (D.D.C. December 9, 1975); *Hughes Aircraft Company* v. *Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974); *Legal Aid Society of Alameda County* v. *Shultz,* 349 F. Supp. 771 (N.D. Cal. 1972). Therefore, the Court holds that § 709(e) does not bar disclosure of these documents.

Only John Hancock relies on 44 U.S.C. § 3508. Section 3508 provides that when confidential information supplied to one agency is released to another agency, the recipient agency is subject to the same disclosure restrictions as the original agency. John Hancock argues that since the EEO-1s [14] were in effect released to the OFCC by the EEOC, under § 3508 the OFCC is subject to the same disclosure restrictions with respect to this data as is the EEOC, in particular § 709(e). The EEO-1s were released to the OFCC by the Joint Reporting Committee (JRC), not the EEOC. The arguments put forth by John Hancock to circumvent this hurdle to the applicability of § 3508 have repeatedly met with defeat in the courts. *See Sears, Roebuck and Co.* v. *General Services Administration,* 509 F.2d 527 (D.C. Cir. 1974); *Goodyear Tire and Rubber Co.* v. *Schlesinger, supra; Lawyers Cooperative Publishing Co.* v. *Schlesinger,* C.A. No. 74-212 (W.D.N.Y. July 20, 1974). Therefore, the Court holds that the disclosure of the EEO-1s is not barred by § 3508.

The applicability of 18 U.S.C. § 1905 to these documents presents a more difficult question.[15] Section 1905 imposes

[14] Apparently John Hancock limits its § 3508 argument to EEO-1s. Even if the argument is addressed to the AAPs and CRRs as well, it is equally defective.

[15] To a large extent this issue will soon be of historical interest only. Congress has recently amended the (b)(3) exemption, in Public Law 94-409, to limit its scope. The Committee reports indicate that one of the purposes of this amendment is to assure that § 1905 is not considered to be within the ambit of exemption (b)(3). See H.R. Rep. No. 880, 94th Cong., 2d Sess., Part I, 23 (1976) and

criminal sanctions for the unauthorized disclosure of commercial or financial information submitted to the government. The insurance companies rely on the Fourth Circuit's recent decision in *Westinghouse Electric Corp.* v. *Schlesinger*, Nos. 74-1801, 74-1806, 74-2047, and 74-2048 (4th Cir. Sept. 30, 1976), and precedents from other district courts to the effect that § 1905 is one of the statutes incorporated into the (b)(3) exemption and that AAPs, EEO-1s, and CRRs are exempt from disclosure, in part, because of § 1905.[16]

The District of Columbia Circuit has taken a somewhat different approach to the applicability of § 1905. In *Charles River Park "A", Inc.* v. *H.U.D., supra*, this Circuit indicated that while the (b)(3) exemption may incorporate § 1905, the scope of § 1905 is no broader than the scope of the (b)(4) exemption to the Act. *Id.* at 941 n. 7. Consideration of § 1905 was deemed to be appropriate in a reverse-FOIA case only after a court determined that the information sought falls within the (b)(4) exemption. At that point, § 1905 was seen as a check on the discretionary disclosure of exempt information. *Id.* at 943.[17] Therefore,

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Conference Report, H.R. Rep. No. 1441, 94th Cong., 2d Sess., 25 (1976).

[16] They rely primarily on *Chrysler Corp.* v. *Schlesinger*, 12 F.E.P. Cases 1478 (D. Del. 1976), and *Westinghouse Electric Corp.* v. *Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974). However, the court in *Westinghouse* expressly declined to resolve the question of the applicability of § 1905 to EEO-1s and AAPs, although it did view plaintiff's argument as raising substantial questions. *Id.* at 1248-49.

[17] The insurance companies argue that the Supreme Court's decision in *F.A.A. Administrator* v. *Robertson*, 422 U.S. 255 (1975), sheds doubt on the merits of this Circuit's interpretation of the (b)(3) exemption and § 1905. The *Robertson* decision was concerned primarily with the question of what statutes fall within the ambit of the (b)(3) exemption. The Circuit's decision in *Charles*

consideration of the applicability of § 1905 is premature at this point and will be deferred until after this Court considers the applicability of the (b)(4) exemption.

Exemption (b)(4)

This exemption applies to "trade secrets and commercial or financial information" which is "privileged or confidential." Specifically, this exemption applies to confidential documents whose disclosure would cause substantial competitive injury to the person from whom the information was obtained or would impair the government's ability to obtain information. *National Parks and Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The courts which have considered the applicability of this exemption to EEO-1s, AAPs, and CRRs have reached disparate results. *Compare Westinghouse Electric Corp.* v. *Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *affirmed Westinghouse Electric Corp.* v. *Schlesinger*, Nos. 76-1802, 74-1802, 74-2047, and 74-2048 (4th Cir. Sept. 30, 1976); *U.S. Steel Corp.* v. *Schlesinger*, 8 F.E.P. Cases 923 (E.D. Va. 1974), *affirmed Westinghouse Electric Corp.* v. *Schlesinger*, Nos. 76-1801, 74-1802, 74-2047, and 74-2048 (4th Cir. Sept. 30, 1976); *Chrysler Corp.* v. *Schlesinger, supra; with Sea-Land Service, Inc.* v. *Morton*, C.A. No. 76-161 (D.D.C. 1976); *Sears, Roebuck and Co.* v. *General Services Administration*, 402 F. Supp. 378 (D.D.C. 1975) *appeal pending; Goodyear Tire and Rubber Co.* v. *Dunlop, supra; Hughes Aircraft Company* v. *Schlesinger, supra; Lawyers Cooperative Publishing Co.* v. *Schlesinger, supra.*

In the instant action, the companies have shown that there is a substantial likelihood that some, but not all, of the information concerned in these documents falls within the (b)(4) exemption. The companies have made this showing with respect to the work force analyses, depart-

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River Park "A", Inc. v. *H.U.D., supra*, construed the scope of § 1905 and to that extent is not affected by the *Robertson* decision

ment lists and projected promotions data contained in the AAPs and any portions of the CRRs which incorporate this data. The companies have not made this showing with respect to the EEO-1s or any of the other information contained in the AAPs or CRRs.

The testimony adduced at the hearing revealed that the insurance industry is a highly competitive industry and that the insurance companies involved in this action are engaged in intense competition with numerous other companies.[18] There are approximately 1600 to 1800 insurance companies in the United States.[19] These companies, including the insurance companies who are parties to this action, compete not only with other insurance companies but also with the newly emerging administrative services companies.[20] These administrative services companies perform only the administrative functions involved in insurance business.[21] Dr. Schwartzchild, testifying for D.C. NOW and the federal defendants, agreed that there was intense competition at the point of sale, although he did not believe there was competition in other aspects of the insurance business.[22] The witnesses for the insurance

[18] Tr. 153, 256-57, 260-61, 285, 287, 479-6, 479-7, 479-8, 487, 515, 601-02, 605, 699-70, 738, 764. In fact, no testimony was adduced to the effect that the insurance industry was not a competitive one. Neither D.C. NOW nor the federal defendants has seriously questioned the existence of competition in this industry, at least with respect to competition in the sale of insurance products.

[19] Tr. 257, 610.

[20] Tr. 30, 285, 497-7.

[21] Tr. 30.

[22] Tr. 153, 256-57, 260-61. Dr. Schwartzchild also testified that the price of the insurance product was an important aspect of the competition at the point of sale. Tr. 260. Dr. Carbone testified for John Hancock that both service and the ability to recruit and train employees, as well as price, were important in meeting the intense competition in the insurance industry. Tr. 508.

companies testified throughout the hearing that competition exists in all aspects of the insurance business.[23] In the case of group insurance contracts such as the one handled by John Hancock's Ford Group Office which is renewable on an annual basis, the competition at the time of renewal is particularly intense.[24]

The work force analyses, department lists, and projected promotions data contained in these documents are clearly confidential commercial information.[25] This data constitutes commercial information in that it pertains to the mode of operations, work force, policies, and employment practices of these companies. The companies have not customarily released these documents to the public and have consistently treated this information in a confidential manner.[26]

With respect to the question of whether disclosure of these documents will cause substantial competitive harm to the companies or impair the government's ability to obtain information, the companies have set forth numerous contentions as to how such detrimental results will flow from disclosure of these documents. The Court is not persuaded that there is a substantial likelihood that disclo-

[23] In addition, Dr. Rutenberg testified that because Prudential has diversified its business into areas other than insurance, it is competing not only against many insurance companies, but also against mutual funds, real estate companies, and mortgage bankers. Tr. 699.

[24] Tr. 29-30, 285, 287, 479-6, 479-7. In fact, John Hancock reported that it was recently unsuccessful in its competition with Aetna for the Ford Motor Company's dental insurance contract for its union employees. Tr. 479-6 to 479-7.

[25] Other courts which have considered this question have also determined that these documents are commercial and financial information. See *Westinghouse Electric Corp.* v. *Schlesinger, supra* at 684; *U. S. Steel Corp.* v. *Schlesinger, supra* at 924.

[26] Tr. 384, 454, 520-23, 653, 663-65.

sure of these documents will impair the government's ability to obtain information. The Court is also not persuaded that all of the information contained in these documents falls within exemption (b)(4) because its disclosure would result in substantial competitive harm [27] or that all of the companies' claims to competitive injury have merit. The Court has determined, however, that the companies have shown that there is a substantial likelihood that the disclosure of the work force analyses, department lists, and projected promotions data contained in the AAPs and any portions of the CRRs which incorporate this data would result in substantial competitive injury to the companies.

1. Work Force Analyses and Department Lists

The work force analyses, or manning tables, contain a breakdown by specific job categories of the total number of employees in each job category and of the number of women and minorities in each job category.[28] Metropolitan's Department lists also reveal the number of women, and, in the 1975 Department List, the number of minority group members ("MGMs") employed in each of the Company's specific job categories. The disclosure of this information would cause the companies substantial compe-

[27] The companies do not appear to be arguing that all of the information contained in the EEO-1s, AAPs, and CRRs comes within the ambit of the (b)(4) exemption. They certainly have not introduced any evidence on, or otherwise attempted to show, how many portions of these documents, such as policy statements and introductory comments, come within this exemption.

[28] For purposes of clarity, when the Court speaks of work force analysis or manning tables, it is referring to the computer printouts and tables so titled, the Utilization Analyses, and the information contained on the line "Incumbents in job group," of "B. Annual Goals," in the "Utilization Analyses, Goals and Timetables" in Metropolitan's AAPs. These documents contain the same type of information and present the same considerations.

titive harm by increasing the companies' vulnerability to employee raiding.

The raiding or proselytizing of employees is a serious problem faced by the insurance industry today,[29] particularly for large companies with sophisticated training programs such as John Hancock, Metropolitan, and Prudential.[30] Proselytizing of employees is particularly prevalent during periods when there is a sharp increase in demand for particular labor skills or categories of employees.[31] Such an increase is occurring today in the insurance industry with respect to female and minority group members with the training and experience these companies provide.[32] Thus, the raiding of employees, particularly of women and minority group members, is a distinct and serious prospect for these companies.

Although raiding has occurred in the past without access to these documents through the use of other sources of information,[33] these alternative sources of information do not provide as efficient and comprehensive a method for employee raiding as the manning tables and department

[29] Tr. 33, 40, 479-17, 491, 519, 607-08.

[30] Tr. 606-612. The testimony revealed that both John Hancock and Prudential had in the past lost valued employees to others because of raiding. Tr. 510, 607-608, 754-55. Dr. Carbone testified that attempts had been made to proselytize him. Tr. 510.

[31] Tr. 607-610.

[32] *Id.* NOW's and the government's expert, Dr. Schwartzchild, agreed that this raiding of minorities and females trained in insurance would do competitive harm to a company. Tr. 256.

[33] Tr. 184, 186, 189, 315, 631-32, and 715-16. The alternative sources of information referred to by D.C. NOW and the federal defendants are personal contacts, trade and inhouse publications on noteworthy employees, trade association membership lists, the information on file with state insurance commissions, "headhunters," and general knowledge in the insurance industry about successful salespersons.

lists would provide. The licensing information on file with the state insurance commissions is not particularly useful since it pertains only to sales agents and does not reveal the agent's race or sex or whether the agent is an active, inactive, or part-time agent.[34] The membership lists of various industry associations may provide some useful information on potential raiding targets, but not all employees belong and those that do are listed only if they have paid their dues.[35] While a raider may be able to stumble upon a trade or in-house publication about noteworthy employees, such publications are not helpful in locating the experienced but less visible employee. Dr. Schwartzchild testified that a raider's contacts within a particular office would be an easier method than the use of these documents to locate employees,[36] but this assumes that the raider has such contacts.[37] Finally, none of these sources provide the raider with a comprehensive picture of the breakdown of the work force in particular offices.[38]

Even with the names and identification numbers of employees deleted, disclosure of the manning tables would

[34] Tr. 307, 529, 654, 668. While Schedule G which is also filed with state insurance commissions lists employees earning more than $30,000 a year, it would not be of any use in locating employees paid less than $30,000. As Dr. Rutenberg testified, many key employees in whom raiders would be particularly interested earn less than $30,000 a year. Tr. 722. Indeed, only about 2½% of Prudential's employees are listed on Schedule G. Tr. 616.

[35] Tr. 306, 654-55. Mr. Dunn testified that Prudential has found that these membership lists are not at all accurate with respect to its employees. Tr. 654-55.

[36] Tr. 189, 315.

[37] Neither D.C. NOW nor the federal defendants demonstrated how frequently raiders had such contacts or how adequate they were.

[38] Dr. Schwartzchild admitted that he did not know of any other source of information which would reveal the number of people employed in a particular office. Tr. 189.

significantly enhance a person's ability to locate employees and the companies' vulnerability to raiding. The tables systematically and precisely provide information which is currently available, if at all, on a "hit-or-miss" basis. Because the tables provide a breakdown of employees at a particular location by job, grade, sex, and race, these tables provide information on the precise location and availability of many types of employees, such as computer programmers or claims approvers, by sex and race, which does not appear to be currently available to any significant degree. Unlike the existing sources of information, these tables provide a comprehensive picture of employees at a particular office and identify pools of potential subjects for raiding.[39] Disclosure of these tables would, therefore, reveal to the raider which offices are particularly productive grounds for raiding different types of employees. Because these tables identify the precise job in which a person is employed, and hence the person's probable experience and training, as well as the employee's sex and race, they would allow a raider quickly and easily to pinpoint the precise type of employee in which the raider is interested and that person's specific geographic location. Disclosure of these tables would provide a much more accurate and efficient method for raiding than the information currently available. Thus, the disclosure of these tables would increase the efficiency of raiding, the vulnerability of these companies to the raiding of individual employees, and the impact on these companies of such raiding.

The disclosure of this information would also enhance the efficiency of the companies' vulnerability to what has been called "vacuum cleaner" raiding. This occurs when a party raids an entire cadre of employees,[40] which is a

[39] Various witnesses testified at the hearing that this data would reveal the existence of pools of employees and that this information would be particularly useful to potential raiders. Tr. 59-61, 492, 525-26, 546-47, 706-08, 717.

[40] Tr. 700-01, 707-08, 788.

common practice in the insurance industry.[41] Because the manning tables and department lists systematically and comprehensively lay out the number of employees and distribution of these employees among specific job categories at the different offices, the potential vacuum cleaner raider could quickly and easily identify the existence and location of the precise type of team of employees in which he is interested.[42] As noted, this type of information is not currently available from any other source.[43] This increased susceptibility to vacuum cleaner raiding poses a particularly serious problem in light of the rise of the administrative services companies who are looking for teams of trained employees.[44]

The increased susceptibility to more efficient raiding which would result from disclosure of this data would inflict substantial competitive injury on these companies. The loss of experienced and trained employees alone is a serious injury to these companies. It would impair their productivity and efficiency and thereby place them in a weaker competitive position.[45] The acquisition of these trained and experienced employees from these companies by a competitor would also, in turn, greatly strengthen the competitor's competitive position.[46] Added to this is

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[41] Tr. 700-01, 707-09, 710-11. While Dr. Krantz testified that vacuum cleaner raiding is an almost nonexistent practice, Tr. 789, he must not have been aware that Prudential was the subject of this practice when it lost the entire nucleus of a group insurance office. Tr. 608.

[42] Tr. 707-08.

[43] See note 38 *supra* and accompanying text.

[44] Tr. 479-17, 479-18.

[45] Service is an important aspect of the competition in the insurance industry. Tr. 508. Consequently, this impairment of the efficiency and adequacy of their service would cause serious competitive injury.

[46] Tr. 479-19.

the substantial cost involved in replacing only one employee.[47] With increased raiding, the cost of replacing lost employees would become quite burdensome. This burden would most likely be reflected in an increased price for the companies' products; and since price is a critical element in meeting the competition in the insurance industry,[48] these companies would be placed at a disadvantage in meeting the competition.

The increased susceptibility to vacuum cleaner raiding would also seriously injure these companies. A competitor interested in expanding into a new area or employing a new technology but who does not have employees trained in the new area or technology could easily shanghai an entire team of employees from these companies, which team would readily be revealed from these tables. Not only would such pirating confer a great advantage on the competitor who would thereby be able to offer new and more challenging competition, it would also critically disrupt the operations of the raided company which would place it at a serious disadvantage in meeting this competition.[49]

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[47] Testimony was adduced at the hearing that the cost of replacing a claims adjuster is $6,000, the cost of replacing a senior examiner is about $16,000 and the cost of replacing a field examiner is $25,000. Tr. 368-69. Mr. Thomas Kelley, an Assistant Vice President at Metropolitan, put the total investment in recruiting, training and developing a sales representative over three and a half years at $75,000. Affidavit of Mr. Thomas Kelley, Metropolitan Exhibit 2, ¶ 5. Mr. Peter Carbone, John Hancock's Vice President of Sales, testified that a new sales agent receives an allowance during training and is in effect subsidized during his initial sales experience. The cost of the training allowance is more than $6,000 in the first year. Tr. 509. Mr. Carbone further testified that training expense was a tremendous expense incurred by John Hancock. *Id.* Dr. Hendricks also testified that the resulting cost of retraining would add an undue expense to a company. Tr. 368.

[48] Tr. 260, 508, 510-11.

[49] Tr. 699-700.

Moreover, there is a danger that raiding could occur precisely for the purpose of hurting a competitor as much as for the purpose of gaining experienced employees.[50] Dr. Rutenberg testified that enormous competitive damage could be visited upon these companies by a competitor intent upon doing such damage. With access to the detailed information contained in the work force analyses, a competitor could pinpoint perhaps no more than 12 critically located technical employees whose loss would cause the companies enormous problems.[51]

The courts which have considered the problem of raiding in connection with the disclosure of EEO-1s, AAPs, and CRRs have reached disparate results. In *Chrysler Corp.* v. *Schlesinger, supra,* the court determined that the work force analyses fell within the (b)(4) exemption in part because of the raiding problem disclosure presented. In both *Sears, Roebuck and Company* v. *General Services Administration,* 402 F. Supp. 385 (D.D.C. 1975), and *Hughes Aircraft Company* v. *Schlesinger, supra,* the courts were unconvinced by the information suppliers' raiding arguments. In both of these cases the companies apparently based their raiding analysis on the somewhat similar premises. In *Sears,* the companies appear to have argued that these documents reveal disgruntled employees who would be susceptible to raiding. *Id.* at 384 n. 10. In *Hughes,* the companies apparently contended that disclosure of the information revealing employee turnover would reveal employee dissatisfaction, and thereby encourage raiding of the company's employees. *Id.* at 297. The insurance companies here have proceeded upon entirely different, and much sounder, premises. In the two other cases in this district court which determined that AAPs did not fall

[50] Tr. 710.

[51] Tr. 710-1.

within the (b)(4) exemption,[52] the raiding argument was apparently not presented to the courts.

With respect to the companies' other contentions as to how disclosure of the manning tables would result in substantial competitive harm, this Court is unpersuaded. The companies introduced extensive testimony on how a competitor would be able to discern their labor costs from the use of the manning tables in conjunction with wage surveys of the Bureau of Labor Statistics ("BLS").[53] However, the BLS salary data contains only averages for each occupation;[54] there is no direct correspondence between the occupational categories of the BLS and those employed in the tables; the wage surveys, which are conducted only once in five years,[55] would not provide accurate, up-to-date, data in these inflationary times except in the year of the survey; and the wage surveys do not contain data on other critical elements of labor costs, such as fringe benefits.[56] All of the witnesses

[52] See *Sea-Land Service, Inc.* v. *Morton, supra; Goodyear Tire and Rubber Co.* v. *Dunlop, supra.*

[53] The OFCC determined to delete the salary data contained in the AAPs. Consequently, a competitor would need an alternative source of salary information to be able to compute labor costs. The insurance companies appear to consider the BLS data as the best, and most likely, alternative. For purposes of the companies' motions for preliminary injunction, the Court has evaluated the alleged effects of disclosure of these documents in light of the deletion of salary data. However, D.C. NOW has indicated that it is not withdrawing its request for the salary information and intends to raise this question in conjunction with any motions for a permanent injunction. Tr. 42.

[54] Tr. 54-55.

[55] Tr. 22. The most recent BLS data for the insurance industry was compiled in 1971. Affidavit of Norman Samuels, an Assistant Commissioner for Wages and Industrial Relations in the Bureau of Labor Statistics, Department of Labor, filed October 21, 1976.

[56] Tr. 54-57, 487.

who testified on this subject agreed that a significant margin of error was involved,[57] and the insurance companies' witnesses only testified that a competitor could get a "good fix" on labor costs,[58] which is a somewhat imprecise characterization. The use of the manning tables with the BLS data would provide only the roughest approximation of labor costs and not result in substantial competitive injury.

The insurance companies also contend that the data in these documents provide a model for the organization of an office and the deployment of a sales force which competitors would emulate if the data were revealed. This contention assumes that the office organization and sales force deployment employed by these companies is productive and efficient and that competitors are aware of this. The record does not support such a finding. Further, this information would be useful only if the competitor knows the nature and volume of the business conducted at that facility. The companies failed to demonstrate that competitors are in possession of such information, except perhaps in the case of establishments such as John Hancock's Ford Group Office. Even there, the efficiency of the office is unknown.[59]

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[57] Dr. Rowan admitted that estimates of a company's labor costs based on the BLS data would involve a 5 to 10% margin of error. Tr. 90. Dr. Schwartzchild felt that the margin of error would be greater, about 20%. Tr. 151, 316.

[58] *E.g.*, Tr. 22, 28, 44.

[59] The argument that disclosure of the AAPs for facilities serving one contract, such as John Hancock's Ford Group Office, would allow competitors to establish an "efficiency index" which they could use to improve their efficiency is unpersuasive for similar reasons. This argument assumes that such offices are operating at optimum efficiency and that competitors know this. Neither of these assumptions is supported by the record.

The insurance companies also introduced testimony to the effect that disclosure of most of the companies' AAPs over a period of time would reveal new products and technologies and expansion into or the withdrawal from different markets. These arguments assume that most of the AAPs for a period of years will be disclosed, which questions are not before this Court.[60] The AAPs subject to the FOIA request are substantially less than most of the companies' AAPs and are only those for the year 1975. Even so, changes in the work force composition or distribution opinion that this data is, and has been treated by the intechnology, or product expansion.[61]

2. Data on Projected Promotions

At the outset, D.C. NOW and the federal defendants have questioned whether the statistical and narrative data on projected promotions contained in the AAPs and CRRs are confidential information. They argue that employees are counseled in general terms concerning their promotion prospects, this counseling is done in general terms and does not involve specific projections or timetables contained in the AAPs.[62] Consequently, the Court is of the opinion that these data are, and have been treated by the insurance companies as, confidential information.

The companies have shown that there is a substantial likelihood that disclosure of the statistical and narrative

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[60] *Accord, Sears, Roebuck and Company* v. *General Services Administration*, 402 F. Supp. 378, 383-84 (D.D.C. 1975). See note 3 *supra* and accompanying text for a discussion of what documents are currently at issue.

[61] For example, such changes could simply reflect employee turnover. The witnesses testified on this point only in general terms and never precisely explained what would be revealed and how.

[62] Tr. 384, 398, 400, 407-08, 454, 460, 561-63.

data on projected promotions [63] would cause them to suffer serious competitive injury through its effect on employee morale and productivity.[64] From this data, a substantial number of employees could ascertain the plans for their promotion, or the lack thereof.[65] The insurance companies' witnesses testified that, as a result of such perceptions, employees' morale and productivity would be adversely affected.[66] Employees who "know" they will be promoted will conclude that little further effort is required since their promotion is "assured." The morale and productivity of employees who perceive no chance of promotion in

[63] By the phrase "projected promotions," the Court is referring to data on intended future promotions, not promotions which have already occurred.

[64] The affidavit of Dr. John R. Heinrichs, President of Management Decision Systems, Inc., dated July 14, 1976, explains in detail the psychological theory, known as the expectancy theory, of how disclosure of this data will affect employee morale.

[65] Tr. 350-62, 388, 433, 556. For example, from Metropolitan's 1976 Law Department AAP, 66% of the employees will know whether or not there are plans to promote them in the next year, and 58% of the employees that they will not be promoted for the next two years. Tr. 359. From Metropolitan's 1975 Law Department AAP, 73% of the employees will know whether or not there are plans to promote them. Tr. 360.

After reviewing the documents and evaluating the testimony, it appears to the Court that in most, although not all, instances, employees can deduce their promotion plans or the lack thereof from the projected promotions data. This is a sufficient showing by the insurance companies at this stage of the proceedings. However, because of the possibility that certain portions of the projected promotions data do not reveal promotion prospects with sufficient certainty, a more detailed analysis of this data will be required if any motions for a permanent injunction are brought.

[66] Tr. 348-50, 361-65, 396, 553-55. D.C. NOW and the federal defendants stress that the companies do not intend these projections as guarantees or hard facts. While the companies may not intend these projections to be so interpreted, this does not change the fact that employees will so interpret this data. Tr. 401, 462.

the near future will deteriorate because they will "know" that however hard they work, they will not be promoted. Dr. Krantz, who testified for D.C. NOW and the federal defendants, admitted that these data require careful handling.[67]

The insurance companies have shown that this deterioration in morale and productivity will cause them substantial competitive injury. Demoralized employees are likely to leave their jobs,[68] which would result in the loss of the investment of the companies in these employees and the additional expense of recruiting and training new employees.[69] Those employees who do not leave will be less committed to their jobs,[70] and this loss of productivity would also be quite costly.[71] These additional expenses would seriously impair the companies' ability to be effective competitors in terms of the price of their products. Further, managerial employees would have to devote more time and energy to employee counseling and handling morale-related problems.[72] Finally, the quality of the service provided by these companies, which is so critical to successful competition,[73] would deteriorate. Employees suffering from a morale crisis would provide less effective service to customers.[74] This would place these companies in a seriously handi-

[67] Tr. 786.

[68] Tr. 366-68, 554-55.

[69] See note 47 *supra* concerning the cost of training employees.

[70] Tr. 365-68, 554-55.

[71] With a decline in productivity, these companies would have to hire additional personnel to compensate for this decline. See note 47 *supra* for the costs of training such new personnel.

[72] Tr. 370.

[73] Tr. 37-38, 349, 508, 510-11.

[74] Tr. 349-50, 365-7.

capped position vis-a-vis service competition with other companies.

3. Other Information Contained in the Documents.

The companies have failed to show that disclosure of any other information in the documents which are the subject of this suit would result in substantial competitive injury. Many of the companies' contentions as to how disclosure of the EEO-1s and other portions of the AAPs will cause them competitive harm were also raised with respect to the manning tables. Those claims which the Court found unpersuasive with respect to the manning tables are also unpersuasive when applied to the EEO-1s and other portions of the AAPs for the same reasons.

Disclosure of the EEO-1s would not cause the companies to suffer any competitive injury. Since these reports do not contain any data on projected promotions, no adverse effect on employee morale would result from their disclosure. Their disclosure would also not increase the companies' vulnerability to raiding. The job categories employed in the EEO-1s are much less specific than the job categories contained in the manning tables. Consequently, they would be of little use in pinpointing the existence of particular employees or teams of employees.

The agency has agreed to delete data on training programs which reveals the entry of a company into a new market or with respect to new products or processes and has done so.[75] Consequently, the agency has adequately dealt with many of the companies' objections to disclosure of this data.

The testimony with respect to the training data in the AAPs was in general terms, and the witnesses did not explain how this data would reveal new processes and

[75] See letter of Lawrence Lorber, Director of the OFCC, to William F. Joy, dated July 13, 1976.

products or how disclosure would otherwise result in competitive injury. Many of the training programs are common training programs which any major insurance company would be expected to have.[76] Further, the fact that a large or small number of employees is enrolled in a particular training program is susceptible to several interpretations, such as high or low employee turnover in those jobs or that the program has been made available to all employees. The training data would not be particularly useful to a potential raider since it does not reveal the specific job held by the trainee or the total number of employees who have taken a particular course.

The companies have also failed to demonstrate how a competitor could use the information contained in the application logs, the other information contained in the termination logs or the list of recruiting sources to inflict substantial competitive injury upon them. Certainly the termination logs are useless to a raider; and the application logs, like the training data, lack the specificity and comprehensiveness of the manning tables. Most of the recruiting sources are ones commonly used by employers,[77] and the names of individual contacts within a source would be of little use to a competitor unless it knew how helpful that source was and went to the trouble of cultivating that particular source itself.

4. Impairment of the Government's Ability to Obtain Information.

The insurance companies have failed to demonstrate a substantial likelihood of success on the merits with respect to their claim that disclosure of the AAPs will impair the government's ability to obtain information. Title VII of

[76] Tr. 62, 230, 233-36, 240-41.

[77] For example, local community colleges and the local chapter of the NAACP are such common sources.

the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Executive Orders, and the agencies' regulations promulgated thereunder require the companies to report much of the information contained in the AAPs. However, testimony was adduced to the effect that these reports contain *more* information than the companies are required to provide and that if they were publicly available, in the future, the quantity and quality of information provided would decline.[78] By agreeing to disclose most of the information contained in the AAPs, the ICS must have felt that disclosure would not impair its ability to obtain information. Further, the threat of compliance actions and/or refusing to enter into contracts with these companies, should enable the ICS to obtain the information it desires. *Accord, National Parks Conservation Ass'n* v. *Morton, supra* at 770; *Hughes Aircraft Company* v. *Schlesinger, supra* at 296.

Exemption (b)(6)

This exemption applies to personnel, medical, or similar files the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(6). In this Circuit, the information must satisfy a three-part test for this exemption to be applicable: (1) the information must constitute personnel, medical or similar files; (2) the disclosure of the information must constitute an invasion of personal privacy; and (3) the severity of the invasion of personal privacy must outweigh the public interest in disclosure. *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73, 76-77 (D.C. Cir. 1974); *Getman* v. *N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1971. In the instant action, the government has agreed to delete employees' names, social security numbers, employee identification numbers, and other identifying information. The government has not made clear what it means

[78] Tr. 31-33, 99, 100, 378, 381-82, 559. Affidavit of Thomas C. Kelley, dated September 7, 1976, at ¶ 12, filed September 15, 1976; affidavit of Colby Tibbetts dated September 7, 1976, at ¶ 21, filed September 15, 1976.

by the phrase "other identifying information."[79] Since this Court finds that even with names and identification numbers deleted from these documents, individual employees can still be identified in certain portions of the AAPs, that in certain contexts such identification would result in a clearly unwarranted invasion of personel privacy, and that the government's statement concerning "other identifying information" is nebulous at best, this Court is of the opinion that certain portions of the AAPs which the government has not clearly determined to delete may well come within the (b)(6) exemption to the Act. These portions are: (1) the statistical data or narrative data on projected promotions or the lack of promotion prospects;[80] (2) the Department Lists contained in Metropolitan's AAPs; (3) the reasons for termination contained in the Termination Tables contained in John Hancock's AAPs;[81] and (4) the narrative comments in the AAPs involving performance or job evaluations or the preferences, goals, or comments of employees where there is a reasonable possibility that the employee could be identified by other persons.

[79] At the hearing D.C. NOW waived any right to any personal, identifiable, negative information concerning employees. Tr. 114. D.C. NOW did not waive any right to any other personal information about an identifiable individual.

[80] The Court is referring to the same statistical and narrative data on projected promotions which was found to be within the (b)(4) exemption. See pages 24-26, *supra.*

[81] Metropolitan's and Prudential's termination tables do not contain the detail provided in John Hancock's termination logs. Consequently, employees could not be identified from the data contained in their termination tables, whereas such identification is possible with John Hancock's log because of the extensive information contained therein. For a case in this District Court also ordering the deletion of the reasons for an employee's termination, see *Sea-Land Services, Inc.* v. *Morton, supra.*

For purposes of clarity, some further comments on the type of narrative comments this Court has determined fall within exemption (b)(6) are in order. Such comments most frequently occur in the "Problem Areas" or "Goals and Timetables" portions of the AAPs. This Court does not mean to imply, however, that all narrative comments in these two sections are exempt or that only the comments in these two sections are exempt. The following examples are intended to illustrate the types of narrative comments this Court finds fall within the (b)(6) exemption:

a) A comment that an MGM in a particular unit or department who was hired six months ago is doing very well and shows management potential;

b) A comment that a female in a particular unit or department who was recently promoted is training for a particular job;

c) A comment that the MGMs in a particular unit or department do not show much potential;

d) A comment that no promotions are anticipated in a particular unit or department in the next year, or two years; and

e) A comment that in a unit or department with approximately thirty employees only one or two promotions is anticipated in the next year or two.

More general narrative comments, as illustrated below, do not fall within the ambit of the (b)(6) exemption:

a) A comment that there is a low turnover in a particular unit or department;

b) A comment concerning the number of persons hired, promoted, or transferred in the last year;

c) A comment that the company intends to hire or recruit more women or MGMs for a particular job or unit; and

d) A comment that a certain unnamed woman in a unit employing 20 women is well suited to her job.

Much of the information contained in the AAPs does not constitute a personnel, medical, or similar file within the meaning of (b)(6). However, those portions of the AAPs which contain data on promotions, job performance, job evaluations, and personal preferences and goals do constitute "similar files" in that they reflect highly personal details about company employees. *Rural Housing Alliance* v. *United States Department of Agriculture, supra,* at 77.

Much testimony was adduced at the hearing to the effect that individual employees being referred to in the AAPs could be identified by their fellow workers.[82] After reviewing the representative AAPs, this Court is also of the opinion that such identification is possible with respect to John Hancock's termination logs, Metropolitan's department lists, the projected promotion tables and certain narrative comments.[83] These portions of the AAPs, even with names and identification numbers deleted, still contain sufficient information, such as dates of hire and termination, job title, race, and sex, to enable a co-worker or other person in possession of this information to rec-

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[82] Tr. 44, 351, 372-75, 556, 624-25. Consideration of the possibility that persons particularly familiar with the information will be able to identify individuals, even though the general public could not, is appropriate in determining whether disclosure will result in an invasion of privacy. *Department of the Air Force* v. *Rose,* 96 S. Ct. 1592, 1608 (1976).

[83] After reviewing the documents and evaluating the testimony, it appears to the Court that while identification is possible in most instances, it may not be possible in all instances. This is a sufficient showing to warrant a preliminary injunction. A more discriminating analysis of this data to pinpoint precisely when identification is and is not possible would be required before any permanent injunctive relief would be warranted.

ognize the employee to whom the tables or comments pertain.[84]

The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job-performance evaluations, and personal preferences and goals and the reasons for an employee's termination contained in these portions of the AAPs would constitute a substantial invasion of the companies' employees' personal privacy.[85] The disclosure of negative comments or information about an employee on these subjects could be quite embarrassing and painful to the employee. While many of the comments and much of the information are favorable or neutral, the (b)(6) exemption was designed to protect individuals from a wide range of embarrassing disclosures, not just the disclosure of derogatory information.[86] Indeed, the disclosure of favorable information could place the employee in a very embarrassing position with other, possibly jealous, employees.[87]

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[84] The information supplier's claim to a (b)(6) exemption in *Sears, Roebuck and Company* v. *General Services Administration,* 402 F. Supp. 378 (D.D.C. 1975), appears to have been rejected in large part because the Court did not feel that individual employees could be identified. *Id.* at 384. As the AAPs submitted to this Court reveal, the AAPs vary greatly in the amount and manner of presentation of the information contained in these documents. Thus, it may be that *Sears'* AAPs did not contain the same kind of detail as those presented to this Court.

[85] The Court is not persuaded by the companies' claims that disclosure of an employee's sex and marital status would result in an invasion of privacy. An employee's sex must be obvious, and marital status is almost as equally well known to co-workers. To the extent that any invasion of privacy would result from disclosure of an employee's marital status, it would be quite slight.

[86] *Rural Housing Alliance* v. *United States Department of Agriculture, supra* at 77.

[87] Tr. 559.

To determine whether the invasion of privacy is "clearly unwarranted," this Court must *de novo* balance the severity of the invasion of personal privacy with the public interest in disclosure, with a "tilt" in favor of disclosure. *Rural Housing Alliance* v. *United States Department of Agriculture, supra; Getman* v. *N.L.R.B., supra.* In the instant action, the invasion of the employee's privacy which would result from the disclosure of this information would, as discussed, be substantial. D.C. NOW asserts that the public interest will be served by disclosure in that D.C. NOW intends to use the information to further the goals of equal employment opportunity and elimination of discrimination in employment. D.C. NOW also claims that it has no alternative sources for securing this information. While the interest asserted by D.C. NOW is one which has been considered by the courts in determining whether an invasion of personal privacy is clearly unwarranted[88] and D.C. NOW probably has no other source for this information, the severity of the potential invasion outweighs the factors favoring disclosure in this case. Much of the information, such as that concerning the employee's personal preferences and goals and job performance evaluations, has little, if any, relevance to the public interest asserted. Thus, deletion of such information will have no effect on the public interest asserted. Some of the information may be relevant to this public interest. However, the information the disclosure of which this Court feels would result in a substantial invasion of personal privacy constitutes only a very small portion of the information contained in the APPs. Deletion of this small amount of information should not significantly impair the achievement of D.C. NOW's goals. To the extent that any impairment may result from non-disclosure, the severity of the invasion outweighs such an impairment to the achievement of the public interest.

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[88] *See Sears, Roebuck and Company* v. *General Services Administration,* 402 F. Supp. 378, 384 (D.D.C. 1975).

Exemption (b)(7)

The insurance companies contend that these documents are investigatory records compiled for law enforcement purposes within the meaning of exemption (b)(7), and, as such, are exempt from mandatory disclosure under the Act. In light of recent cases by this District Court and the United States Court of Appeals for the District of Columbia Circuit, the Court is of the opinion that the companies have not shown a substantial likelihood of success on the merits with respect to this contention.

Unlike the present case, in the cases relied upon by the companies to support their position, the government was raising the (b)(7) exemption. In both *Goodyear Tire and Rubber Company, supra* and *Sears, Roebuck and Company* v. *General Services Administration,* 384 F. Supp. 966 (D.C.C. 1974), this District Court refused to apply exemption (b)(7) in reverse-FOIA actions. In *Sears,* the Court determined that this exemption was designed to protect the interests of the government, not private parties, and therefore held that where, as here, the government determines to disclose information, a private party lacks standing to assert the government's interests under exemption (b)(7). *Id.* at 1004.

Although this Circuit has not affirmed the position taken by the District Court, it has held that the (b)(7) exemption does not apply to AAPs and EEO-1s for other reasons. Distinguishing between reports compiled as part of a routine monitoring process and reports compiled as part of an investigation focusing directly on specifically alleged illegal acts, the Court determined that the AAPs and EEO-1s which a government contractor was required to supply in order that its compliance with executive orders could be monitored were not "investigatory files" and were not exempt under (b)(7). *Sears, Roebuck and Company* v. *General Services Administration,* 509 F.2d 527, 529-30 (D.C. Cir. 1975). In the instant action, the

insurance companies' AAPs and EEO-1s were submitted in connection with the OFCC's general monitoring process and not in connection with an investigation of specific illegal actions of the companies. The CRRs were compiled by the agency as part of this same routine monitoring process.

Agency Discretion

The fact that certain portions of the AAPs and CRRs contain exempt information does not alone prevent their disclosure. In this circuit, the disclosure of exempt information is discretionary with the agency, and can only be reversed for an abuse of discretion. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 943. Once the court determines that the information sought falls within an exemption, it must then determine whether the agency abused its discretion. In determining whether the agency abused its discretion, the court must determine first whether the disclosure of the exempt information would be a violation of § 1905 and if not, whether disclosure would otherwise be an abuse of discretion. *Id.* at 943. In the instant case, some of the exempt information the agency determined to disclose comes within the ambit of § 1905, and, in addition, the agency abused its discretion in determining the disclose the exempt information.

Section 1905 imposes criminal penalties on government employees who disclose any information coming to them in course of their employment which relates to, *inter alia,* processes, operations or styles, if such disclosure is not authorized by law. If the disclosure of exempt information would constitute a criminal offense, such disclosure would be clear abuse of the agency's discretion. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 943. In the instant case, the disclosure of certain portions of the information the Court has determined to be exempt would constitute a criminal offense under § 1905. Hence, the agen-

cy's decision to disclose this information was a clear abuse of its discretion.

The agency officials obtained the information in the APPs and CRRs in the course of their employment. The manning tables, department lists, and projected promotions [89] contained therein constitute information pertaining to processes, operations, and styles of work within the meaning of § 1905.[90] The disclosure of this information is not authorized by law. The federal defendants' argument that disclosure is authorized by the regulations implementing the FOIA, 41 C.F.R. §§ 60-40.1 *et seq.* ignores the fact that the Act is not a source of authority for promulgating regulations on information exempt under the Act. The release of exempt information cannot be justified on the basis of such regulations. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 942.

Apart from § 1905, the agency also abused its discretion in determining to disclose the exempt information. The ICS and the OFCC failed to exercise any discretion with respect to the exempt information and to give any meaningful consideration to whether discretionary disclosure was appropriate. In addition, the disclosure of the exempt information in the face of government representa-

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[89] Those portions of the AAPs and CRRs which are exempt from mandatory disclosure only by virtue of Section (b)(6) and do not also come within the (b)(4) exemption, are not within the ambit of § 1905. That information does not constitute information relating to processes, operations or styles of work within the meaning of § 1905. Further, this Circuit has indicated that the scope of § 1905 is, at best, coextensive with the scope of the fourth exemption. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 941 n. 7.

[90] Other courts which have considered the applicability of § 1905 to AAPs and CRRs have reached similar conclusions. *See Chrysler Corp.* v. *Schlesinger, supra* at 1483; *see also, Westinghouse Electric Corp.* v. *Schlesinger, supra* at 1248-49.

tions of confidentiality was, on the facts presented here, an abuse of discretion.

The administrative record, primarily letter rulings addressed to the insurance companies, reveals that both the ICS and OFCC considered only the applicability of the FOIA exemptions to the information sought by D.C. NOW. Having determined that the information did not fall within an exemption to the Act, they never reached the question of discretionary disclosure of the data. As a result, the record reflects no meaningful consideration of whether it would be an appropriate exercise of their discretion to disclose the exempt information. Such a failure to exercise any discretion, and the resulting failure to engage in any meaningful consideration of this question, constitutes an abuse of that discretion.

The Court must also consider the public interest in disclosure in determining whether the agency abused its discretion in determining to disclose the exempt information. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 943. The public interest in disclosure asserted by D.C. NOW is that D.C. NOW intends to use the documents to monitor the companies' compliance with the equal employment opportunity laws. Much of the information D.C. NOW seeks has been determined not to be exempt information. With access to this information, D.C. NOW should be able substantially to achieve its public interest goals, even though some portions of the documents would not be disclosed. Balanced against the public interest is the insurance companies' interest in protecting their competitive position and the employees' interest in their privacy. Disclosure of the exempt information would seriously impair these interests. On the balance, the slight harm to the public interest from non-disclosure of these documents is outweighed by the serious harm to the employees and the companies which would result from the disclosure of these documents.

The companies also claim that the representation of confidentiality allegedly made by the government when the companies submitted these documents somehow prevent their disclosure. As to those portions of the documents which are subject to mandatory disclosure under the Act, any such representations would not preclude their disclosure. A government agency cannot evade the requirements of the FOIA simply by representing to an information supplier that the information will be kept confidential. *See Legal Aid Society of Almeda County* v. *Shultz, supra* at 776; *Lawyers Cooperative Publishing Company* v. *Schlesinger, supra* at 4.[91]

With respect to those portions of the documents containing exempt information, the alleged representations of confidentiality present a more difficult question of whether the agencies abused their discretion in determining to disclose this information in light of such representations. Initially, the parties are in dispute as to whether any such representations were made. Dr. Whitman of the ICS testified for the government that to the best of his knowledge the ICS did not give assurances of confidentiality.[92] However, Dr. Whitman, when questioned as to whether he was sure such assurances had not been made, only stated that the ICS had been instructed not to give such assurances.[93] The insurance companies adduced testimony to the effect that

[91] The companies' claims with respect to assurances of confidentiality as to the EEO-1s must fail for an additional reason. The statement on the EEO-1 forms supplied by the government relied upon by the companies provides: "All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII." This assurance of confidentiality is limited by its terms to the requirements of § 709(e) of the Civil Rights Act. The Court has already determined that this provision does not apply to EEO-1s submitted to the ICS.

[92] Tr.464.

[93] Tr. 472-73.

the company understood that the data they submitted would be treated confidentially.[94] The Court is persuaded, after evaluating the testimony on this matter, that the companies were led to believe that the documents submitted by them would be accorded confidential treatment.

The information contained in the AAPs is much more extensive than it need be under the applicable Executive Orders and regulations. It appears that such extensive information was included by the companies in reliance on these assurances of confidentiality. The agencies did not investigate the companies' claims about representations of confidentiality or consider whether the discretionary disclosure of information was appropriate in light of such assurances. Under these circumstances, the disclosure of the exempt information was an abuse of discretion.[95] While it may be that it is not always an abuse of discretion to disclose after assurances of confidentiality have been made,[96] the agency must at least give some meaningful consideration to whether disclosure under such circumstances is appropriate.

Pursuant to 41 C.F.R. §§ 60-40.8 *et seq.*, the insurance companies were permitted to file written objections to the disclosure of these documents with the ICS and OFCC. They were not given an oral hearing on their claims of exemption. Metropolitan claims that the agencies abused their discretion and denied it due process by failing to

[94] Tr. 469, 475, 559, 576, 577-78, 653.

[95] This Circuit has indicated that the fact that information is submitted to an agency in confidence does not alone render the agency's decision to disclose such information an abuse of discretion, if the public interest favors disclosure. *Charles River Park "A", Inc.* v. *H.U.D., supra* at 943. As has already been discussed, disclosure of the exempt information in the instant case will not serve any public interest which cannot be adequately achieved by the disclosure of the non-exempt information in these documents.

[96] *See Charles River Park "A", Inc.* v. *H.U.D., supra* at 943.

hold such a hearing. Similar allegations have met with defeat in the courts. *See Chrysler Corporation* v. *Schlesinger, supra* at 1483; *Lawyers Cooperative Publishing Company* v. *Schlesinger, supra* at 3. This Court is also of the opinion that the failure to hold an oral hearing did not constitute an abuse discretion or a deprivation of due process.

Irreparable Injury

The disclosure of those portions of the documents containing exempt information would irreparably injure the insurance companies. Once disclosed, such information would lose its confidentiality forever. As has been already noted in the discussion of the merits, there is a strong likelihood that disclosure will cause substantial injury to the companies and their employees. Since the confidentiality of this information can never be regained, the above injuries would indeed be irreparable.

Neither D.C. NOW nor the federal defendants will suffer any substantial harm from nondisclosure. D.C. NOW complains that it will be seriously injured by the grant of a preliminary injunction because the delay in disclosure will cause the data to become increasingly stale.[97] It is noted that most of the information contained in the documents does not fall within the terms of the preliminary injunction. To the extent that D.C. NOW will suffer any injury from the grant of a preliminary injunction, such injury is clearly outweighed by the serious and irreparable injury to the

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[97] D.C. NOW also claims that the grant of a preliminary injunction will cause it injury by requiring it to expend additional time and expense in litigation. This is true whenever a court issues a preliminary injunction, and, hence, does not warrant any special consideration. Further, a corresponding injury would be suffered by the insurance companies should this court deny injunctive relief. In any event, it would appear to this Court from the nature of the lawsuit and the representations of the parties that neither the grant nor denial of a preliminary injunction will end this litigation here.

insurance companies which would result from a denial of injunctive relief.

The public interest will not be harmed but will be served by the grant of injunctive relief with respect to the exempt information. The public interest in disclosure of this information through its use to monitor the companies' compliance with equal employment opportunity laws and to remove informational barriers to equal employment and the fear of rejection suffered by potential job applicants will not be impaired by the grant of injunctive relief. The information which will be disclosed, which amounts to a substantial portion of the information sought by D.C. NOW, should be sufficient to foster these goals. Additionally, the public interest in protecting the privacy of the companies' employees and in insuring that the agencies fulfill their responsibilities under the Act will be served.

/s/ Oliver Gasch
Judge

Date: December 6th, 1976.

(Caption Omitted in Printing)

Order

It is by the Court this 14th day of December, 1976,

Ordered that the Court's Memorandum in the above-captioned cases, issued on December 6, 1976, be, and hereby is, amended as follows:

1. On page 1, footnote 1, the last word in the footnote is changed from "agency" to "industry";
2. On page 3, line 2, the word "Insurance is changed to "Assurance";
3. On page 3, line 1 of footnote 4, the words "Insurance Company" are changed to "Assurance Society of the United States";
4. On page 25, line 10, the word "employers" is changed to "employees";
5. On page 25, line 1 of footnote 64, the word "Henricks" is changed to "Hinrichs"; and
6. On page 42, line 19, the word "disclosure" is changed to "nondisclosure".

/s/ Oliver Gasch
Judge

APPENDIX B

(Caption Omitted in Printing)

Order

Upon consideration of the motions for a preliminary injunction brought by the John Hancock Mutual Life Insurance Company, the Metropolitan Life Insurance Company, and the Prudential Life Insurance Company of America, the opposition thereto, and the entire record herein, and for the reasons set forth in the Memorandum attached hereto, it is by the Court this 6th day of December, 1976,

Ordered that the motions for a preliminary injunction be, and hereby are, granted with respect to work force analyses, the department lists, the statistical and narrative data on projected promotions, the reasons for an employee's termination contained in John Hancock Mutual Life Insurance Company's termination logs, the narrative comments concerning an employee's performance, preferences or comments where there is a reasonable possibility that the employee could be identified contained in the AAPs and any portions of the CRRs which incorporate this data from the AAPs; and it is further

Ordered that the motions for a preliminary injunction in all other respects be, and hereby are denied.

/s/ Oliver Gasch
Judge

APPENDIX C

(Caption Omitted in Printing)

(Filed December 16, 1976)

Order

This Freedom of Information case is before the Court on the motion of three insurance companies, Metropolitan Life Insurance Company, Prudential Life Insurance Company of America, and John Hancock Mutual Life Insurance Company, for stay pending appellate review. The respondents to this motion are W. J. Usery [*sic*] as Secretary of the Department of Health, Education and Welfare, and the National Organization for Women. The objective of the stay is to maintain the status quo ante until these movants can be heard at the appellate level on their motion to stay that portion of this Court's ruling which denied their motion for preliminary injunction. It is noted that the objective of the insurance companies' motion for preliminary injunction at the District Court level was to prevent the Secretary from turning over to the National Organization for Women certain information submitted by the companies to the Secretary, which submission was required of them as government contractors. After a four-day hearing in September, the Court granted on December 8, 1976, the motion for preliminary injunction to the extent that the companies were able to satisfy the Court that the release of this material would cause the companies substantial competitive injury and invade the privacy of the companies' employees. Other material submitted by the companies was ruled not subject to this preliminary injunction. Respecting this latter category of material, the companies John Hancock and Metropolitan are seeking this stay pending appeal. Prudential seeks a stay pending appeal on a more restricted basis concerning divulgence of its EEO-ls.

This Court recognizes that there are substantial issues for resolution on this appeal. Since this Court felt bound by the decision of the United States Court of Appeals in *Sears, Roebuck and Co.* v. *General Services Administration*, 509 F.2d 527 (D.C. Cir. 1974), it may be that the companies will seek to take their appeal to the Supreme Court of the United States.

Accordingly, for these reasons the Court concludes that under the criteria established for this Circuit in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), a stay pending appeal wherein the companies would be afforded the opportunity of presenting and having considered their motion in the United States Court of Appeals should be granted. The Court recognizes that the date of this Order is December 16, 1976, and that many of the Judges at the Circuit level may have made plans for the Holiday Season. The Court expresses the hope, however, that the matter can be heard as expeditiously as possible.

Wherefore, it is by the Court this 16th day of December, 1976,

Ordered that the Federal defendants, their agents, officers and employees be, and hereby are, enjoined from disclosing any of the portions of the affirmative action programs or compliance review reports not prohibited from disclosure by the preliminary injunction issued on December 6, 1976, and the EEO-1 reports or related documents of John Hancock Mutual Life Insurance Company and of Metropolitan Life Insurance Company; and it is further

Ordered that the Federal defendants, their agents, officers and employees be, and hereby are, enjoined from disclosing the EEO-1 reports or related documents of Prudential Life Insurance Company of America; and it is further

ORDERED that this stay shall continue in effect pending hearing and decision on movants' motion for stay in the United States Court of Appeals for the District of Columbia Circuit, provided that movants proceed expeditiously for stay in the United States Court of Appeals.

/s/ OLIVER GASCH
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

No. 76-2119

Civil Action 76-0087

NATIONAL ORGANIZATION FOR WOMEN
WASHINGTON, D.C. CHAPTER

v.

SOCIAL SECURITY ADMINISTRATION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant

No. 76-2120

Civil Action 76-0914

METROPOLITAN LIFE INSURANCE COMPANY

v.

W. J. USERY, SECRETARY OF LABOR, ET AL

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant

No. 76-2128

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant

Civil Action 76-0914

v.

W. J. USERY, SECRETARY OF LABOR, ET AL

No. 76-2129
Civil Action 76-0087

NATIONAL ORGANIZATION FOR WOMEN
WASHINGTON, D.C. CHAPTER

v.

SOCIAL SECURITY ADMINISTRATION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL
METROPOLITAN LIFE INSURANCE COMPANY, *Appellant*

No. 76-2163

NATIONAL ORGANIZATION FOR WOMEN
WASHINGTON, D.C. CHAPTER

v.

SOCIAL SECURITY ADMINISTRATION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Appellant*

No. 76-2164
Civil Action 76-0914

METROPOLITAN LIFE INSURANCE COMPANY

v.

W. J. USERY, SECRETARY OF LABOR, ET AL

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Appellant*

BEFORE: Wright and Leventhal, Circuit Judges

(FILED JANUARY 19, 1977)

Order

IT IS ORDERED by the Court, *sua sponte,* that the above captioned cases are consolidated for consideration on the

merits, and on consideration of the motions for stay filed in the above captioned cases, and of the oppositions thereto, it is

ORDERED by the Court that the aforesaid motions for stay are denied.

Per Curiam

APPENDIX E

Statutory Provisions Involved

5 U.S.C. § 552, KNOWN AS THE FREEDOM OF INFORMATION ACT PROVIDES:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any man-

ner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of dupli-

cation. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case

the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations

to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which

a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect that requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or

for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or em-

ployee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

SECTION 709 OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-8(e), AS AMENDED, PROVIDES:

§ 2000e-8. Investigations—Examinations and copying of evidence related to unlawful employment practices

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times

have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any case or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this secton would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship,

the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

Prohibited disclosures; penalties

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to

its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

44 U.S.C. § 3508 PROVIDES:

§ 3508. Unlawful disclosure of information; penalties; release of information to other agencies

(a) If information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law including penalties which relate to the unlawful disclosure of information apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.

(b) Information obtained by a Federal agency from a person under this chapter may be released to another Federal agency only—

(1) in the form of statistical totals or summaries; or

(2) if the information as supplied by persons to a Federal agency had not, at the time of collection, been declared by that agency or by a superior authority to be confidential; or

(3) when the persons supplying the information consent to the release of it to a second agency by the agency to which the information was originally supplied; or

(4) when the Federal agency to which another Federal agency releases the information has authority to collect the information itself and the authority is supported by legal provision for criminal penalties against persons failing to supply the information.

Standard Form 100
(Rev. 12-75)
Approved GAO B-180541 (R0077)

EQUAL EMPLOYMENT OPPORTUNITY
EMPLOYER INFORMATION REPORT EEO-1

Joint Reporting Committe

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

Section A — TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☐ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only)_____

Section B — COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2, this section) — a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment — c.

Address (Number and street)	City or town	County	State	ZIP code	d.

b. Employer Identification No. (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company — b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C — EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☐ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☐ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☐ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60-1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

NOTE: If the answer is yes to ANY of these questions, complete the entire form; otherwise skip to Section G.

APPENDIX F

Section D — EMPLOYMENT DATA

Employment at this establishment--Report all permanent temporary or part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

In columns 1, 2, and 3, include ALL employees in the establishment including those in minority groups.

Job Categories (See Appendix (5) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (4) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian * (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian * (10)	Spanish Surnamed American (11)
Officials and managers											
Professionals											
Technicians											
Sales workers											
Office and clerical											
Craftsmen (Skilled)											
Operatives (Semi-skilled)											
Laborers (Unskilled)											
Service workers											
TOTAL →											
Total employment reported in previous EEO-1 report											

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

* In Alaska include Eskimos and Aleuts with American Indians

1. NOTE: On consolidated report skip questions 2-5 and Section E
2. How was information as to race or ethnic group in Section D obtained?
   1 ☐ Visual Survey
   2 ☐ Employment Record
   3 ☐ Other — Specify .....
3. Dates of payroll period used –
4. Pay period of last report submitted fo this establishment
5. Does this establishment employ apprentices?
   This year? 1 ☐ Yes 2 ☐ No
   Last year? 1 ☐ Yes 2 ☐ No

Section E — ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 ☐ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on combined basis
2. Is the major business activity at this establishment the same as that reported last year?
   1 ☐ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

e.

Section F — REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information

Section G — CERTIFICATION (See instructions G)

Check one

1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. ☐ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII

WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001

No. 76-1052

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D. C., CHAPTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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OPINION BELOW

The memorandum opinion of the district court (Pet. App. A) is reported at 14 F.E.P. Cases 83. Petitioners are seeking a writ of certiorari before judgment in the court of appeals and thus there is no opinion on the merits by that court.

JURISDICTION

The judgment of the district court (Pet. App. B) was entered December 6, 1976. On December 16, 1976, petitioners filed notices of appeal from that judgment. These appeals have been docketed and consolidated in the court of appeals (Pet. App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 2000e-8(e) and 44 U.S.C. 3508(a) bar a federal agency other than the Equal Employment Opportunity Commission from disclosing a private employer's EEO-1 reports.

2. Whether confidential statistical data contained in a private employer's EEO-1 reports and related affirmative action plans are exempt from disclosure under exemption 3 of the Freedom of Information Act in conjunction with 18 U.S.C. 1905.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth at Pet. App. E.

STATEMENT

Petitioners[1] brought these actions in the United States District Court for the District of Columbia, seeking to enjoin the federal respondents[2] from complying with a Freedom of Information Act ("FOIA") request by respondent National Organization for Women, Washington, D. C., Chapter ("NOW"), for the disclosure of certain documents that petitioners had furnished to the federal respondents pursuant to their contractual obligations to be

[1]Petitioners are the Prudential Life Insurance Company, John Hancock Mutual Insurance Company, and Metropolitan Life Insurance Company.

[2]The federal respondents are the Secretary of Health, Education, and Welfare, the Commissioner of Social Security, the Chief of the Insurance Compliance Staff of the Social Security Administration, the Secretary of Labor, and the Director of the Office of Federal Contract Compliance Programs.

equal opportunity employers.[3] See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303. The documents at issue are Equal Employment Opportunity Forms 100 ("EEO-1's") and Affirmative Action Plans ("AAP's"), which government contractors are required to submit to the federal respondents to aid in monitoring compliance with the federal government's equal employment opportunity program, and Compliance Review Reports ("CRR's"), which are periodic reports prepared by the Insurance Compliance Staff of the Social Security Administration to determine whether the contractor is complying with the equal employment opportunity program. See 41 C.F.R. Part 60.

On petitioners' motion for a preliminary injunction, the district court granted partial relief, ordering that certain parts of the AAP's and CRR's should be withheld from disclosure but that the remainder of those documents, and all of the EEO-1 reports, could be disclosed. The district court found that there was a "substantial likelihood" that the portions of the AAP's and CRR's ordered withheld contained information that was exempt from mandatory

[3]The proceedings in the district court began as a suit for disclosure of the documents, brought by respondent NOW against the federal respondents and petitioners. Petitioners asserted "reverse FOIA" cross-claims against the federal respondents to enjoin any contemplated disclosure. *National Organization for Women, Washington, D.C. Chapter* v. *Social Security Administration of the Dept. of HEW, et al.*, D. D.C., Civil No. 76-0087. That case was consolidated with a separate and earlier suit brought by petitioner Metropolitan Life Insurance Company to enjoin the disclosure of its documents subject to respondent NOW's FOIA request. *Metropolitan Life Insurance Co.* v. *Usery, et al.*, D. D.C., Civil No. 70-914.

disclosure under exemption 4 of the FOIA[4] (Pet. App. 5a-6a, 11a-28a), and that while the exempt nature of such information did not alone prohibit disclosure, in the circumstances of this case disclosure would constitute an abuse of the agency's discretion[5] (Pet. App. 35a-40a).

The district court rejected petitioners' arguments that disclosure of the EEO-1's was prohibited by Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508; the court also rejected the argument that disclosure of the EEO-1's and AAP's was prohibited by 18 U.S.C. 1905. Relying on prior decisions of the District of Columbia Circuit (*e.g., Sears, Roebuck & Co.* v. *General Services Administration*, 509 F. 2d 527), the district court held that neither Section 709(e) nor 44 U.S.C. 3508 were applicable to the documents in issue (Pet. App. 8a-9a). With respect to 18 U.S.C. 1905, which is a criminal statute prohibiting government officials from disclosing certain information "in any manner or to any extent not authorized by law," the district court again followed prior decisions of the District of Columbia Circuit (*e.g., Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F. 2d 935; see also *National Parks and Conservation Association* v. *Kleppe*, 547 F. 2d 673) and held that that statute prohibited only the disclosure of information that was exempted from mandatory disclosure under exemption 4 of the FOIA (see Pet. App. 10a, 35a-36a).

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[4]Exemption 4 provides that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are— * * * trade secrets and commercial or financial information obtained from a person and privileged or confidential * * * ." 5 U.S.C. 552(b) (4).

[5]The court also ruled that certain portions of the AAP's contained information protected from mandatory disclosure under exemption 6 of the FOIA, 5 U.S.C. 552(b)(6). Exemption 6 applies to information the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy."

In short, although the district court found that there is a "substantial likelihood" that portions of the AAP's and CRR's should not be disclosed (Pet. App. 11a, 35a-36a), the court concluded that none of the statutes relied upon by petitioners "specifically exempted [the documents] from disclosure" within the meaning of exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).[6]

Both petitioners and respondent NOW appealed, and the petition for a writ of certiorari before judgment followed.[7]

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[6]Effective March 12, 1977, exemption 3 has been amended (Pub. L. 94-409, 90 Stat. 1247) to apply to matters that are:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

[7]At petitioners' request, the district court stayed its judgment and enjoined the federal respondents from disclosing any of the documents pending petitioners' application for a stay in the court of appeals (Pet. App. 44a-45a).

Petitioners' motions for a stay in the court of appeals requested that disclosure be enjoined until a petition for a writ of certiorari before judgment could be filed or, alternatively, until applications for a stay could be filed in this Court. On January 19, 1977, the court of appeals denied the stay application.

Before the court of appeals acted upon the stay application petitioners applied to this Court for a stay pending disposition of the instant petition for a writ of certiorari before judgment. On January 26, 1977, the Chief Justice granted the stay "pending filing of a memorandum by the Solicitor General of the United States and further consideration and order by the Chief Justice or by the Court." The Solicitor General, on March 9, 1977, filed an opposition to petitioners' stay application. The question of the stay is pending before the Court.

ARGUMENT

1. Issuance of a writ of certiorari before judgment in the court of appeals is an extraordinary procedure. Under Rule 20 of the Rules of this Court, a petition for such a writ will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." No such showing can be made in this case. Cf. *United States* v. *Nixon*, 418 U.S. 683; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

The questions presented by petitioners in this case are whether Section 709(e) and 44 U.S.C. 3508 prohibit the federal respondents from disclosing the EEO-1 reports in their possession and whether 18 U.S.C. 1905 is comprehended by exemption 3 of the FOIA so that information within its coverage is both exempt from mandatory disclosure under the FOIA and nondisclosable. Neither of these questions are of such imperative public importance as to warrant review by this Court before judgment in the court of appeals.

Section 709(e) prohibits the disclosure by "any officer or employee of the [Equal Employment Opportunity] Commission" of information "obtained by the Commission pursuant to its authority * * * ." 42 U.S.C. 2000e-8(e). However, as the district court pointed out (Pet. App. 1a, 8a), none of the documents at issue was obtained by the EEOC. Instead, the material was obtained by the Insurance Compliance Staff of the Social Security Administration pursuant to Executive Order 11246 and the regulations promulgated thereunder (41 C.F.R. Part 60). Moreover, none of the federal respondents is an "officer or employee of the Commission." Thus, the district court correctly held that Section 709(e) by its own terms has no bearing upon the

disclosability of the documents at issue in this case.[8] There is no conflict among the courts of appeals on this issue.[9] See, *e.g.*, *Sears, Roebuck & Co.* v. *General Services Administration, supra; Westinghouse Electric Corporation* v. *Schlesinger*, 542 F. 2d 1190 (C.A. 4), petition for a writ of certiorari filed February 28, 1977 (No. 76-1192) (see pp. 9-12, *infra*).

On the second question presented, petitioners contend (Pet. 20) that review is necessary to resolve a clear conflict in the courts of appeals "on whether [exemption 3] in the FOIA incorporates 18 U.S.C. 1905." Petitioners are correct that the courts of appeals presently are divided on this issue. Compare, *e.g.*, *Sears, Roebuck & Co.* v. *General Services Administration, supra*, 509 F. 2d at 529, with *Westinghouse Electric Corporation* v. *Schlesinger, supra*, 542 F. 2d at 1199-1203. Subsequent to those decisions, however, an amendment to exemption 3 that may have bearing upon the conflict has taken effect (see note 6, *supra*). The District of Columbia Circuit has since reaffirmed its view that 18

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[8]Similarly, the district court correctly held that 44 U.S.C. 3508 also was inapplicable (Pet. App. 9a). That statute prohibits officials of one government agency from disclosing information received from another agency, where the transmitting agency is itself prohibited from publicly disclosing the information. Here, the Insurance Compliance Staff did not receive petitioners' EEO-1 reports from the EEOC, which is bound by the nondisclosure provision in Section 709(e), but, rather, from the Joint Reporting Committee, which is not bound by any such provisions. Accordingly, 44 U.S.C. 3508 does not make Section 709(e) applicable to this case. See *Sears, Roebuck & Co.* v. *General Services Administration, supra*, 509 F. 2d at 529.

[9]Justice Douglas once expressed the view that there is a "substantial question" concerning the applicability of Section 709(e) to cases like this one. *Chamber of Commerce* v. *Legal Aid Society*, 423 U.S. 1309, 1311-1312 (in chambers). That question, however, uniformly has been decided against petitioners' contentions by the courts that have squarely faced the question.

U.S.C. 1905 is not within the ambit of exemption 3. *National Parks and Conservation Association* v. *Kleppe*, *supra*. But the Fourth Circuit has not yet reconsidered its contrary holding in *Westinghouse Electric* in light of the new wording of the statute. Such reconsideration, which may resolve the conflict, would appear to be appropriate before this Court undertakes to resolve the issue.[10]

In any event, it is not clear what practical significance this issue has for this or any other case. Petitioners advance the theory that 18 U.S.C. 1905 is an exemption 3 statute as one basis for insulating from mandatory disclosure EEO-1 reports and AAP's "insofar as they contain confidential statistical data."[11] But "confidential statistical data" may already be exempt from mandatory disclosure by exemption 4 of the FOIA, which pertains to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." To the extent that information of the character described in 18 U.S.C. 1905 is exempt from mandatory disclosure by

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[10]The Fourth Circuit, in holding that 18 U.S.C. 1905 was an exemption 3 statute, depended in large measure upon analogy to this Court's decision in *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, which concerned Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson*. See H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976).

[11]18 U.S.C. 1905 forbids the disclosure of certain information, including "confidential statistical data," "to any extent not authorized by law." The disclosure of such information that is not exempt from mandatory disclosure under the FOIA is "authorized" by the FOIA. Thus, in order for petitioners to be able to rely upon 18 U.S.C. 1905 as a basis for nondisclosure, they must at a minimum show that the information is exempt from mandatory disclosure under the FOIA.

exemption 4,[12] there is no need to determine whether the information also is protected by exemption 3.

2. Petitioners suggest (Pet. 28-29) that certiorari before judgment is appropriate here because the government may petition for a writ of certiorari in *Westinghouse Electric* and raise issues "identical to the issues * * * raise[d] in the instant case." On February 28, 1977, the Solicitor General did file a petition for a writ of certiorari in *Westinghouse Electric* (No. 76-1192). But the questions presented in the petition in that case are significantly different from the questions petitioners have presented here. If the Court grants the petition in *Westinghouse Electric*, it will have no occasion to reach the questions presented in this case.

As the petition in *Westinghouse Electric* shows (No. 76-1192, Pet. 3-11), that case also involves attempts by government contractors to enjoin disclosure of EEO-1 reports and AAP's obtained by the government under Executive Order 11246 and the regulations promulgated thereunder. The Fourth Circuit rejected the contractors' contention that disclosure of the AAP's and EEO-1 reports, in their entirety, was prohibited by Section 709 (e) (No. 76-1192, Pet. App. A, pp. 15a-17a; 542 F. 2d at 1199). The court, however, affirmed the findings of the district courts (made after a *de novo* trial) that the information in certain

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[12]The district court believed (Pet. App. 10a) that "the scope of §1905 is no broader than the scope of the (b)(4) exemption * * * ." See also *Westinghouse Electric Corporation* v. *Schlesinger*, *supra*, 542 F. 2d at 1206 (note 13, *infra*). Petitioners suggest (Pet. 26) that the standard of confidentiality in exemption 4 has been narrowly defined by the District of Columbia Circuit, but they do not explicitly take issue with the district court's statement, and they do not designate what, if any, portions of the documents in question contain information of the character described in 18 U.S.C. 1905 but not exempt from mandatory disclosure under exemption 4.

portions of the documents was within *both* exemption 4 of the FOIA and 18 U.S.C. 1905,[13] and enjoined the disclosure of those portions of the reports (No. 76-1192, Pet. App. A, pp. 56a-57a; 542 F. 2d at 1215-1216).[14]

The questions presented in *Westinghouse Electric* (No. 76-1192, Pet. 2) are:

> 1. Whether the government, pursuant to regulations, may disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.
>
> 2. Whether judicial review of an agency's decision to disclose information pursuant to the regulations is limited to review of the administrative record for abuse of discretion.

Those questions do not include as "subsidiary question[s] fairly comprised therein" the questions posed by petitioners here. Rule 23(1)(c) of the Rules of this Court.

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[13]The Fourth Circuit stated that the standard of confidentiality of exemption 4 and 18 U.S.C. 1905 were the "same" or "coextensive" (No. 76-1192, Pet. App. A, pp. 27a, 36a; 542 F. 2d at 1203, 1204, 1207). The standard of confidentiality adopted by the court was the same as that adopted by the District of Columbia Circuit (No. 76-1192, Pet. App. A, p. 35a; 542 F. 2d at 1207).

[14]The court held that government contractors were entitled to an injunction barring any disclosure that would violate 18 U.S.C. 1905 (No. 76-1192, Pet. App. A, p. 41a; 542 F. 2d at 1210). In the alternative, the court of appeals held that exemption 4 provided the supplier of confidential commercial or financial information with an absolute right to have such information withheld from the public (No. 76-1192, Pet. App. A, pp. 41a-42a; 542 F. 2d at 1210). The court also ruled that the contractors correctly had been afforded a trial *de novo* in the district court on the question whether the information fell within either 18 U.S.C. 1905 or exemption 4.

The Fourth Circuit in *Westinghouse Electric* held that the disclosure prohibition of Section 709(e) did not apply and, thus, our petition raises no question on the validity of that ruling. Because the time for filing a cross petition has run,[15] the respondents in *Westinghouse Electric* cannot raise that issue, since the logic of the contrary argument, *i.e.*, that disclosure of EEO-1 reports is barred by Section 709(e), would lead to a significant modification of the judgments to afford those respondents broader rights to nondisclosure than the lower courts recognized.[16] *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-227 n. 2.

With respect to 18 U.S.C. 1905, the government's petition in *Westinghouse Electric* does not place in issue whether that statute is an exemption 3 statute. Indeed, since the government's petition seeks to have this Court consider whether regulations promulgated by the Secretary of Labor providing for disclosure of EEO-1 reports and AAP's (41 C.F.R. Part 60-40) constitute the disclosure "authorization" contemplated by 18 U.S.C. 1905, this Court (if the petition is granted) need not reach the question of whether that statute is incorporated by exemption 3. If our argument is sustained, it is immaterial whether exemption 3 of the FOIA incorporates 18 U.S.C. 1905: disclosure of the documents would be authorized and therefore permissible in either event. If the argument is rejected, the Court will be left with

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[15]The judgments of the court of appeals in the *Westinghouse Electric* case were entered on September 30, 1976.

[16]The court of appeals' judgments in *Westinghouse Electric* permit disclosure of certain portions of the documents at issue there which could not be disclosed if Section 709(e) applied (see No. 76-1192, Pet. App. A, pp. 6a-7a; 542 F. 2d at 1195, 1216). Thus, unlike *United States* v. *New York Telephone Co.*, petition for a writ of certiorari granted January 25, 1977 (No. 76-835), an argument by respondents in *Westinghouse Electric* based on Section 709(e), if accepted, would change the practical result of the decision below.

a finding that the documents ordered withheld are protected from mandatory disclosure by exemption 4 of the FOIA, and there will be no need for the Court to decide whether the documents also were protected from mandatory disclosure by exemption 3.[17]

3. Petitioners suggest (Pet. 29) that certiorari before judgment is appropriate because "the District of Columbia Circuit has already addressed the legal issues raised by this petition * * * ." We are not aware of any case in which this Court has deemed it appropriate to grant certiorari before judgment on this ground alone. Cf. Stern & Gressman, *Supreme Court Practice*, §4.21, pp. 183-184 n. 48 (1969 ed.). Moreover, although it is true that the District of Columbia Circuit in other cases has resolved the issues raised here adversely to petitioners' position, that does not mean that petitioners are foreclosed from appealing or that an appeal necessarily would be fruitless. Petitioners of course may attempt to persuade the court of appeals that its earlier rulings on these issues are incorrect.

More significantly, it would appear to be open to petitioners to challenge the findings of the district court (see Pet. App. 26a-27a, 32a n. 85) that certain portions of the documents are not exempt from mandatory disclosure under exemptions 4 and 6 of the FOIA and therefore must be disclosed. Petitioners apparently do not claim such exemptions for all portions of the documents in question (see Pet. App. 14a n. 27). But the district court did reject petitioners' claims under exemptions 4 and 6 with respect to

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[17] If under our second question presented in *Westinghouse Electric* the Court holds that review of an agency decision to disclose is limited to review of the agency record, the appropriate disposition would be to vacate and remand for such review. But that disposition would not require the Court to consider whether exemption 3 incorporates 18 U.S.C. 1905.

certain portions of the documents (Pet. App. 26a-27a, 32a n. 85), and petitioners presumably could pursue these claims on appeal. Such claims, since they involve the application of the FOIA to specific documents, have not "already [been] addressed" by the court of appeals.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys.

MARCH 1977.

No. 76-1052

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D. C., CHAPTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The second question presented in the petition in this case is whether information that is of the character described in 18 U.S.C. 1905 is exempt from disclosure under exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3). Petitioners contend that review of this question is necessary because there is a conflict between the District of Columbia Circuit and the Fourth Circuit and that certiorari before judgment is appropriate because the District of Columbia Circuit has already decided the question adversely to the position petitioners assert here.

On April 1, 1977, the District of Columbia Circuit issued an opinion in *Sears, Roebuck and Co.* v. *General*

Services Administration, No. 75-2127, in which it explained, contrary to petitioners' understanding, that the question whether 18 U.S.C. 1905 is an exemption 3 statute is open to reconsideration in that circuit (App. 10a-14a).[1] The court of appeals remanded the case to the district court with the instruction that it "is free to reconsider" the question (App. 13a). In view of the fact that this question remains open in the District of Columbia Circuit, it appears that there is no conflict between the circuits on the question and that there is no substantial basis for petitioners' request that this Court consider their arguments on this question without those arguments having been passed on by the court of appeals.

For these reasons as well as the reasons stated in our brief in opposition, the petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

APRIL 1977.

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[1]For the convenience of the Court, we have set forth the *Sears* opinion in an Appendix to this memorandum.

DOJ-1977-04

APPENDIX

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2127

SEARS, ROEBUCK AND CO., APPELLANT

v.

GENERAL SERVICES ADMINISTRATION, ET AL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(D.C. Civil 2149-73)

Argued 15 December 1976

Decided 1 April 1977

Before: ROBB and WILKEY, *Circuit Judges*, and GESELL,* *United States District Judge for the District of Columbia Circuit.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* This is a "reverse" freedom of information case in which appellant Sears, Roebuck & Company has responded with a declaratory judgment action to prevent the intervenor Council on Economic Priorities from securing under the Freedom of Information Act (FOIA)[1] certain EEO-1 reports and affirmative

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*Sitting by designation pursuant to Title 28, US Code Section 292(a).

[1]5 U.S.C. § 552.

action plans from the defendant General Services Administration. The EEO-1 reports contain data on Sears employees broken down by race and sex, while the affirmative action plans are proposed future action to correct effects of past employment discrimination.

This action is one of several judicial challenges to the Secretary of Labor's new disclosure rules of 2 February 1973,[2] which altered the previous policy of confidentiality guaranteed data submitted by Government contractors in compliance with Executive Orders 11246 and 11375[3] on nondiscrimination. Without reciting in detail the previous procedural steps in both the District Court and this court, which are duly reported,[4] this appeal is from the opinion and order of 26 September 1975 of the District Court.[5]

In that opinion the District Court reaffirmed its previous rulings that the records here do not fall within two of the Act's exempted categories, 5 U.S.C. §552(b)(3) (exempted by statute) and (b)(7) (investigatory files), and similarly ruled that the data was not protected by two other exemptions pressed by Sears, (b)(4) (trade secrets and conifidential data) and (b)(6) (personnel records). The District Court thus granted summary judgment for the intervenor and summary judgment in part for the defendant GSA.

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[2]41 C.F.R. 60-40-1 *et seq.*

[3]3 C.F.R. 169-177 (1974).

[4]384 F. Supp. 996 (D. D.C. 1974), 509 F. 2d 527 (D.C. Cir. 1974).

[5]402 F. Supp. 378 (D. D.C. 1975).

I. Jurisdiction and Standard of Review

The jurisdictional basis for this suit is to be found in 28 U.S.C. §1331(a).[6] The action arises under the FOIA[7] and relief is sought pursuant to the Declaratory

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[6]There has been considerable confusion in recent cases concerning the proper basis for federal court jurisdiction in reverse FOIA cases. The District Court in this case relied on the APA as a grant of subject matter jurisdiction. 384 F. Supp. 996, 1000-01. In addition, this court in *Charles River Park "A" Inc.* v. *HUD* has also relied on Section 10 of the APA for subject matter jurisdiction. 419 F. 2d 935, 939 (1975). The Supreme Court has recently held that Section 10 of the APA is not an implied grant of subject matter jurisdiction to review federal agency action- *Califano* v. *Sanders*, 45 U.S.L.W. 4209 (23 February 1977).

The recent decision of this court in *Planning Research Corporation* v. *FPC* jeld that federal jurisdiction in reverse FOIA cases is properly grounded on 28 U.S.C. §1331. No. 75-1549, Slip op. at 16, (10 March 1977). We are aware of the recent revision of §1331 by Congress to eliminate the $10,000 amount in controversy requirement in civil actions "brought against the United States, any agency thereof, or any officer or employee thereof in his offical capacity." Pub. L. No. 94-574 §2, 90 Stat. 2721 (1976). We will assume *arguendo*, as did the panel in the *Planning Research Corporation* case, that federal jurisdiction is to "be measured according to the provisions of §1331 as it stood when the complaint was filed." *Id.* Slip op. at 14 n. 10. Given this premise, we are confident that the $10,000 requirement of the prior law has been satisfied in this case because of the high value which Sears places on the documents at issue in this case.

[7]We hold in this case that summary judgment was not appropriate on the exemption 4 issue and remand to the District Court for reconsideration of the applicability of this exemption to the EEO-1 reports and affirmative action plans. See text and notes at notes 10 to 13, *infra*. Thus, it can be stated with some confidence that this action arises under the FOIA itself. *See* Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 N.W.L. Rev. 995, 1008 (1976). Given this situation, we need not range as broadly in our rationale as

Judgment Act,[8] since the FOIA provides for actions requiring disclosure but not actions to prevent disclosure of documents that are in the custody of Government agencies. We agree with the District Court that the "actual controversy" here is whether the records sought are exempt from disclosure under the FOIA, and that Sears has a right to a declaratory judgment on this issue.

The Government's position has shifted somewhat. It initally indicated that it desired to release the records, even if not compelled to do so by the FOIA, but its final position in the District Court and here on appeal is that it has not yet determined whether it will release the data, if the ultimate conclusion of the court is that the data is protected by one or more of the exemptions, and thus its release not compelled by the FOIA.

We also agree with the District Court as to the standard of and procedure in review by that court of the agency's action. The District Court is not precluded from a de novo consideration of the issues, since this reverse FOIA case is brought as a declaratory judgment action, not for review of agency action under the APA. The review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case. *Charles River Park "A" Inc.* v. *HUD.*[9]

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the Fourth Circuit did in *Westinghouse* to find federal question jurisdiction under §1331. See *Westinghouse Electric Corp.* v. *Schlesinger, et al.*, 542 F. 2d 1190, 1209-14 (4 Cir. 1976).

[8]28 U.S.C. §2201.

[9]519 F. 2d 935, 940 n. 4, 941 n. 10 (D.C. Cir. 1975). *See Westinghouse Electric Corp.* v. *Schlesinger, et al.*, 542 F. 2d 1190, 1208 n. 57 (4th Cir. 1976).

II. Exemption 4: Trade Secrets and Confidential Commerical Data

5 U.S.C. §552(b)(4) exempts from disclosure ("trade secrets and commercial or financial information obtained from a person and privileged or confidential." The data which Sears claims falls under exemption 4 is in: First, the EEO-1 reports, which detail employment totals in nine occupational categories, specifically broken down by sex and minority group status of employees in each Sears unit; second, the affirmative action plan, drawn up on the basis of 19 job categories, broken down by race and sex, with specific totals for hiring, promotions, terminations, training, and projpcted time tables for attaining the objectives.

The critical issue in this case, under exemptions 4 and 3, is whether this data contains "trade secrets" or other confidential material whose disclosure will "cause substantial harm to the competitive position of" the appellants Sears. *National Parks and Conservation Association* v. *Morton.*[10] On this issue the evidence offered the District Court was conflicting—on which statement is predicated the action we take on this appeal.

Sears filed six affidavits from five experts asserting that from the EEO-1 reports and affirmative action plan employment category totals a knowledgeable competitor could deduce Sears' labor costs, sales volume, plans for expansion, and secure other data valuable to a competitor of Sears. Sears claims these affidavits make a prima facie case for "substantial competitive harm." The intervenor and defendant countered with an affidavit by Dr. Sar Levitan, which asserted that "EEO-1 and the

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[10]498 F. 2d 765, 770 (D.C. Cir. 1974).

affirmative action reports could not be of great usefulness to a Sears competitor. The information which would be released could provide only the roughest approximation of sales volume, growth patterns, or labor costs. Equally accurate approximations are already possible without the use of these data."[11]

It is at this point that we part company with the District Judge. In reference to the affidavit of Dr. Levitan, the District Judge stated,[12] "The court embraces his affidavit and adopts his conclusion]]]]" This statement and the recitation from Dr. Levitan's affidavit, quoted in total above, conclude the District Court's discussion of the exemption 4 issue. The District Court did not specify its reasons for adopting the particular conclusion advanced by Dr. Levitan. The District Court did not recite any facts in the record to which the court gave credence, either as being undisputed or as being preferable in validity to those facts relied upon in the six Sears affidavits.

The question of what this data in the reports would mean to an intelligent competitor is a factual issue. The anser to that issue is in the nature of a fact, a factual conclusion if you prefer, but still partaking of the nature of fact. The Sears affidavits make certain factual assertions concerning the nature of the material in the reports and how this material could be used by intelligent competitors to gain a competitive advantage. For example, the Sears affiants state that the information in the EEO-1 reports and the affirmative action plans cannot be obtained from commercial publications, research services, or other governmental sources. In addition, the claim is made that on-site inspections of Sears'

[11]402 F. Supp. at 384.

[12]*Id.*

retail units cannot yield the same type or quality of information as provided in the reports. As an example of the use to which the information in the reports could be put by competitors, the Sears affiants assert that the information would be of great use to a competitor in determining where to locate future retail stores. In addition, these affiants state that the reports clearly reveal "promotable" individuals who may be induced to leave Sears and move to a competitor. Dr. Levitan's affidavit attempts to refute the claims of competitive harm put forth in the Sears affidavits. Sears asked more than once for an evidentiary hearing, particularly for the purpose of cross-examining Dr. Levitan after his rebuttal affidavit was filed.

The District Judge believed that there were no factual conflicts which would preclude him from granting summary judgment. "While there are conflicts between the Sears affidavit and those of defendant and intervenor, these conflicts do not raise issues of material fact, but rather concern expert opinions as to the adverse consequences to Sears of release of the EEO-1 and AAP reports." [13] We think the existence and nature of any "adverse conseuqences to Sears" are in themselves facts to be ascertained by inquiry. While the "adverse consequences" may be considered as ultimate facts, to be derived from certain undisputed facts in the documents filed by Sears, yet the ultimate facts as to the probable future adverse consequences can only be determined by putting with those undisputed facts other facts within the experts' knowledge to reach the conclusion as to consequences. It is apparent that the five Sears experts and Dr. Levitan relied upon different experience factors

[13]*Id.* at 388 n. 8.

to put with the facts in the documents in reaching their differing conclusion as to consequences.

Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure. The District Court thus attempted to resolve the conflict in the ultimate facts without having the evidence before it. There also appears to be a fact conflict as to the availability of this allegedly confidential data to other persons. Summary judgment was not appropriate.

In regard to the kind of adversay proceeding which the District Judge should conduct, he may do so by any means he thinks appropriate, discovery by interrogatiories, oral depositions, requests for admissions, or an open hearing in court with or without the preceding discovery procedures. The District Judge permitted the filing of affidavits, but he did not permit discovery by any techniques. We think there is a right of confrontation by the appellant Sears versus Dr. Levitan (and likewise by the opposing parties versus the Sears affiants), and so the parties should have the right to examine the affiants either by depositions or in open court. If the conflicts regarding material facts are not resolved in the proceeding conducted by the District Judge, the case should be tried like any other adversary proceeding and the District Court should make findings of fact and conslusions of law.

III. Exemption 6: Personnel, Medical, and Similar Files

The District Judge concluded, in agreement with intervenor Council on Economic Priorities but contrary to

Sears' and GSA's contentions, that two categories of information contained in Sears' submitted data were not within exemption 6.[14] The court reached this conclusion "after weighing the public interest in disclosure of these comments and taking into consideration the character of the comments as well as the unlikelihood that it will be possible for members of the public to attach the comments to particular employees of Sears."[15]

The balancing analysis made by the District Judge is in accord with our prior decisions in *Rural Housing Alliance* v. *U.S. Department of Agriculture, et al.*, [16] and *Getman* v. *NLRB.*[17] Despite the contention of Sears, we do not think that the recently enacted "Privacy Act"[18] would alter the procedure recommended by this court and followed by the District Judge here, nor do we think that the Privacy Act itself puts anything further in the scales for him to weight.

Therefore, in accordance with the principle that findings on matters of fact by the District Court will not be upset unless clearly erroneous, we must agree with the District Court's decision on this point.[19]

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[14]"(1) [C]omments including reasons why applicants were not hired, reasons employees left Sears, and comments concerning promotions; and, (2) service, termination, and promotion dates." *Id.* at 384.

[15]*Id.* at 384-85.

[16]498 F. 2d 73, 77 (D.C. Cir. 1974).

[17]450 F. 2d 670, 674 (D.C. Cir. 1971).

[18]5 U.S.C. §552 (a) *et seq.*

[19]Sears' original claim under exemption 7 (investigatory files) is not at issue on this appeal. Nothing has occurred since the action of the District Court in 384 F. Supp. 996 (1974) and this court in 509 F. 2d 527 (1974) to alter the decision and opinions therein, hence no point under exemption 7 is raised on appeal.

IV. Exemption 3: Specifically Exempted from Disclosure by Statute—18 U.S.C. §1905

Subsequent to both decisions of the District Court a chain of events with regard to the relationship of 18 U.S.C. §1905[20] to exemption 3 of the FOIA occurred. In *FAA Administrator* v. *Roberson*[21] the Supreme Court held that the statute there involved [22] was intended to "restrict public access" to the FAA records and did fall within exemption 3 of the FOIA. This court had held to the contrary and the District Court here had relied upon our opinion.[23] Whereupon the Congress enacted an amendment to exemption 3, with the announced intention[24] of

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[20]18 U.S.C. §1905. *Disclosure of confidential information generally.*

Whoever, being an officer or employee of the United States of of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures or any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[21]422 U.S. 255 (1975).

[22]49 U.S.C. §1504, section 1104 of the Federal Aviation Act of 1958.

[23]384 F. Supp. at 99.

[24]H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (Conference Report).

reversing the Supreme Court's broad interpretaion of exemption 3. The applicable statutory subsection, effective 12 March 1977, reads:

> (b) This section does not apply to matters that are—
>
> . . .
>
> (3) specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld; . . .[25]

After the statute was amended, but before it became effective, this court decided *National Parks and Conservation Associates* v. *Kleppe (National Parks II)*,[26] in which this court reaffirmed its "view that the third exemption 'does not incorporate section 1905 into the FOIA in such a way as to make section 1905 broader than the fourth exemption,"[27] citing our previous decision in *Charles River Park "A", Inc.* v. *Department of HUD*.[28]

We recongize that this court's decisions in *National Parks II* and *Charles River Park* conflict with that of the Fourth Circuit in *Westinghouse Electric Corp.* v.

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[25]5 U.S.C. 552(b)(3), Pub. L. 94-401, 94th Cong. (13 Sept. 1976).

[26]No. 76-1044 (D.C. Cir., 15 Nov. 1976).

[27]*Id.*, Slip Op. at 27, quoting from *Charles River Park*.

[28]519 F. 2d 935, 941 n. 7 (D.C. Cir. 1975).

Schlesinger.[29] The Solicitor General has sought certiorari in *Westinghouse.*[30] Raising similar issues, several insurance companies have viled a petition for writ of certiorari to this court to review before judgment the companies' appeals from a decision of the United States District Court for the District of Columbia in *National Organization for Women* v. *Social Security Administration, et al.* and *Metropolitan Life Insurance Company* v. *Usery, et al.*[31] Following a denial of a stay by this court,[32] the Chief Justice granted a stay[33] pending further consideration by the Supreme Court.

Any reconsideration by us of the issue as to what extent 18 U.S.C. §1905 falls within exemption 3 of the FOIA and thus forbids the disclosure of the records here (assuming that they fall within the description of §1905) would necessarily be a reconsideration of the view of a panel of this court in *National Parks II, supra,* expressed most recently in light of both actions by the Supreme Court and Congress.[34] While the court in *National Parks II* specifically labled its views on §1905 and exemption 3 as dicta,[35] and theoretically we would be free to reconsider the issue, *if* we deemed it essential to the disposition of this case, yet given the presently pending matters

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[29]542 F. 2d 1190, 1204 (4th Cir. 1975).

[30]No. 76-1192, filed 28 Feburary 1977.

[31]No. 76-1052, filed 1 February 1977; C.A. Nos. 76-0087 and 76-0914, 6 Dec. 1976, as amended 14 Dec. 1976.

[32]Nos. 76-2119 *et seq.*, 19 Jan. 1977.

[33]A-586 *et seq.* 45 U.S.L.W. 3517 (1 Feb. 1977).

[34]*Charles River Park, supra,* was decided beofre the Supreme Court decision in *Robertson* and the ensuing Congressional amendment.

[35]No. 76-1044, Slip Op. at 26 n. 46 (D.C. Cir., 15 Nov. 1976).

in the Supreme Court, we think it inadvisable to express an additional view on the same issue.

Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of §1905 and exemption 3 is called for by the actions of the Supreme Court on the aforementioned pending matters. Irrespective of the outcome in the Supreme Court, in reviewing the particular issue the District Judge will doubtless bear in mind, as regards his freedom of action under our own decisions, that this court's views in *National Parks II, supra,* were classed as dicta, and that our views in *Charles River Park, supra,* were expressed before the Supreme Court decision in *Roberson, supra,* or the ensuing Congressional amendatory action. While the amendment to the statute had the effect of excluding §1104 of the FAA from exemption 3, thus reversing the holding of the Supreme Court on this point, it does seem clear, as the Government appellees here agree, that §1905 must be "considered independent of the FOIA" exemptions.[36] That is, contrary to what we thought in *Charles River Park,*[37] the congruence of §1905 with exemption *4* is immaterial; the threshold issue now is whether §1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak; lacking decisive new guidance by the Supreme Court, the District Court is free to reconsider its

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[36]Government Br. at 34. *See* Note, "The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act," 76 Col L. Rev. 1029 (1976).

[37]Note 9, *supra.*

view in light of all that has taken place subsequent to its original decision.

For action in accordance with this opinion the case is

Remanded.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1052

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners,*

v.

NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ORGANIZATION FOR WOMEN, WASHINGTON, D.C. CHAPTER, IN OPPOSITION

LOIS J. SCHIFFER
MARGARET A. KOHN
Women's Rights Project
Center for Law and Social Policy
1751 N Street, N. W.
Washington, D.C. 20036

COLLOT GUERARD
Media Access Project
1912 N Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent National Organization for Women, Washington, D.C. Chapter

Of Counsel:

JUDITH LICHTMAN
Women's Legal Defense Fund, Inc.
1424 16th Street, N.W.
Washington, D.C. 20036

March 30, 1977

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OPINION BELOW

The memorandum opinion of the District Court, which has been informally reported at 14 FEP Cases 83 (D.D.C., 1976), appears in the Petition for Certiorari, Pet. App. A at 1a, et seq.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Respondent believes that the Petition properly presents the following questions:

(1) Whether Federal contract compliance agencies, none of which are the Equal Employment Opportunity Commission, are barred by 42 U.S.C. §2000e-8(e), as incorporated in exemption (b)(3) of the Freedom of Information Act, 5 U.S.C. §552(b)(3), from disclosing EEO-1 reports filed by Federal contractors pursuant to Executive Order 11246 as amended?

(2) Whether EEO-1 reports and limited parts of AAPs are exempt from disclosure under exemption (b)(3) of the FOIA because of 18 U.S.C. §1905?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition at pp. 3-5, one other authority is relevant.

The pertinent regulation of the Office of Federal Contract Compliance Programs, 41 C.F.R. 60-40.4, provides in full:

> §60-40.4. Information disclosure of which is prohibited by law.
>
> The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of Title VII of that Act and its disclosure by employees of the EEOC.

STATEMENT OF THE CASE

Respondent D.C. NOW believes that certain facts in addition to those in the Petitioners' statement of the case are relevant to the Court's consideration of the Petition.

Petitioners Prudential, Metropolitan, and John Hancock, all federal government contractors, have filed EEO-1 reports[1] and other equal employment opportunity

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[1] EEO-1 reports, or Standard Form 100's, require a statistical breakdown of the employer's workforce into nine broad categories by race, sex, and national origin. A sample EEO-1 form is set forth in the Petition for Certiorari, Pet. App. F, at 64a-65a.

data, which Respondent National Organization for Women, Washington, D.C. Chapter ("D.C." NOW") seeks, with the Insurance Compliance Staff of the Social Security Administration ("ICS").[2] The Office of Federal Contract Compliance Programs ("OFCCP") of the Department of Labor, the office which has primary enforcement responsibility for Executive Order 11246, as amended, 3 C.F.R. at 169 et seq., has designated ICS as the contract compliance agency for the insurance industry. The Executive Order requires that government contractors not discriminate in employment on the basis of race, sex, religion or national origin. OFCCP has promulgated regulations to implement the Executive Order, including a requirement that government contractors file EEO-1s, and certain

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[2]Mechanically, the Petitioners, like all other government contractors, file EEO-1 forms with the Joint Reporting Committee, an agency which collects and funnels forms to each federal agency with which they must be filed. The forms directed to ICS never pass through the custody of EEOC. The procedure serves the convenience of the companies, see infra, pp. 15-16, but does not affect legal requirements for disclosure. See, e.g. Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527, 529 (D.C. Cir. 1974); Legal Aid Society of Alameda County v. Shultz, 349 F.Supp. 771, 775-6 (N.D. Calif. 1972).

Affirmative Action Plans ("AAPs"),[3] with the designated compliance agency.[4]

OFCCP regulations promulgated pursuant to the Executive Order put all federal contractors on notice that EEO-1 forms which federal contractors submit to a contract compliance agency such as ICS are subject to public disclosure, notwithstanding §709(e) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-8(e). 41 C.F.R. §60-40.4. Such disclosure is an integral part of doing business with the government.

On January 19, 1977, all three petitioners filed with this Court applications for stays pending the filing of this Petition for Certiorari and a decision thereon.[5] Those stay applications differed significantly. Neither John Hancock nor Prudential requested that this Court stay disclosure of those

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[3]Although AAPs are prepared for each establishment, they are submitted to the compliance agency only upon its request. 41 C.F.R. §60-60.3

[4]See C.F.R. §60-1.7 and §60-2, et seq.

[5]This case is also pending on appeal in the U.S. Court of Appeals for the District of Columbia Circuit on cross-appeals taken by D.C. NOW, the three companies and the federal parties. The brief of appellant/cross-appellee D.C. NOW was filed in that Court on March 21, 1977.

portions of the AAPs which the District Court had found must be disclosed under the FOIA and as to which it denied preliminary injunctions. For those two companies, therefore, the only materials at issue here are their EEO-1 reports. Only Metropolitan contests the release of those limited portions of company AAPs that the District Court found disclosable under the FOIA, although all three companies are competitors. Metropolitan sets forth no special reasons why disclosure of its AAP material--which the District Court found as a matter of fact would not cause substantial competitive harm--is barred by the FOIA.[6]

ARGUMENT

I. CERTIORARI BEFORE JUDGMENT IS AN EXTRAORDINARY REMEDY UNWARRANTED IN THIS CASE.

Certiorari before judgment, requested by the Petitioners here, is rarely granted. U.S. Supreme Court Rule 20; Stern & Gressman, Supreme Court Practice

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[6]Petitioners' failure to describe Metropolitan's AAP material in any detail, or to indicate clearly that it is material which the District Court found would not in any event be covered under 18 U.S.C. §1905 because disclosure would not cause substantial competitive harm (see Pet. App. A, at 26a) demonstrates that Metropolitan's AAP material is not the primary focus of the Petition in this case.

(1969), §4.21 at 183. The remedy is available in only two circumstances, neither of which is present here.

First, the case is not one involving issues of such imperative public importance as to require deviation from normal appellate processes. The case presents no constitutional issues at all, much less any of great significance. The fate of the nation does not ride on the outcome of this case in the way it may have rested on decisions in such cases as United States v. Nixon, 418 U.S. 683 (1974); and Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), cases in which Rule 20 was applied appropriately. Nor does pressure of time prohibit or limit recourse to a Court of Appeals.[7] Matters with far greater

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[7]Petitioners suggest that the only way they can have their case reviewed by this Court is by certiorari before judgment. But they were not barred from seeking relief first from the Court of Appeals, where the issues could have been more carefully delineated, the Court could have considered whether to follow its earlier rulings, and a decision with a statement of the facts and the law helpful to this Court would have been provided. Nor did the companies seek stays from the Court of Appeals or from this Court to permit an appeal to the Court of Appeals. Neither John Hancock nor Metropolitan has ever requested a stay pending appeal from the Court of Appeals or from this Court,

(Continued)

urgency and constitutional significance have been considered by this Court only after review by the United States Court of Appeals. See, e.g. New York Times v. United States, 403 U.S. 713 (1971) (Pentagon Papers); Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917 (1971) (underground nuclear explosion at Amchikta Island, Alaska).[8]

Second, despite Petitioners' claims, no case raising the same or similar questions of law is already pending before this Court. Petitioners suggest that related questions may be presented if this Court grants a petition for certiorari filed on February 28, 1977 in Brown v. Westinghouse Electric Corp., Pet. No. 96-1192, seeking review of Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976). Pendency of a petition for certiorari does not, however, meet the

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and Prudential first requested such a stay pending appeal in its Reply to the Government's Opposition to Stay, filed on March 11, 1977 in Nos. A-586, A-587, and A-588.

[8]The remedy of certiorari before judgment is so extraordinary that Respondents' counsel have found only one case, United States v. Nixon, supra, in which certiorari before judgement was granted during the past five years solely because of the importance of the case.

necessary criteria for application of Rule 20. That Rule has been applied, on limited occasions, when the same parties were involved in the case already pending as well as in the one for which certiorari before judgment was requested. See, e.g. New Haven Inclusion Cases, 399 U.S. 392, 418, cert. granted, 396 U.S. 1056 (1970); Hannah v. Larche, 363 U.S. 420 (1960). The same parties are not involved here.

Also, on rare occasions this Court has granted certiorari before judgment when a case with clearly similar issues had already been accepted for consideration by this Court. To counsel's knowledge, no response has yet been filed to the Petition for a Writ of Certiorari in Westinghouse, supra, and certiorari has not been granted.

Even if this Court grants certiorari in Westinghouse, it should not grant certiorari before judgment here because the cases raise altogether different issues.[9]

First, Westinghouse and the instant case involve different industries, with different competitive consequences for disclosure.

Second, the companies in the Westinghouse case did not prevail on the

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[9]Cf. Petition herein at 3; Petition in Westinghouse, supra, at 2.

issue of whether §709(e) barred disclosure of materials filed under the federal contract compliance program, and did not cross-petition for certiorari on that issue. Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199. Therefore, that issue, raised by Petitioners here, cannot be before this Court in Westinghouse.

Third, the second issue raised by Petitioners here--whether §1905 is included in exemption (b)(3) of the FOIA, and therefore whether certain material covered by §1905 is exempt from disclosure under the FOIA--is also not presented in Westinghouse. Rather, that case raises the question whether material already found exempt from disclosure under the FOIA can be released nevertheless as a matter of agency discretion.

Finally, neither of the questions raised in the Westinghouse petition for certiorari is presented here.[10]

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[10]The Petition for Certiorari in Westinghouse first asks this Court to consider whether the agency can exercise discretion to permit disclosure of material exempt from mandatory disclosure under the FOIA, and then asks what standard of review is appropriate for agency decisions to disclose information. The first question differs from that presented here. See supra, p. 10. The second question in the Westinghouse Petition is not presented because in the instant

(Continued)

Therefore, these cases do not present the same or similar issues for review.

Furthermore, even if a case is pending which raises the same or similar issues, that alone is not sufficient for this Court to grant certiorari before judgment. To be considered, the additional case should present a helpful complement to the earlier case by better illuminating the issues presented. The usual procedure for most related cases is for litigants to take an appeal to the Court of Appeals, and request that the appellate courts defer consideration of cases until the Supreme Court acts on the related case. To depart from that procedure will cause untold clogging of this Court with applications for certiorari in marginally related cases, and impose a great burden on this Court.

II. THE DISTRICT COURT PROPERLY HELD THAT SECTION 709(e) DID NOT BAR DISCLOSURE BY AGENCIES OTHER THAN EEOC OR EEO-1 REPORTS FILED PURSUANT TO EXECUTIVE ORDER 11246 AS AMENDED.

In the instant case, the District Court judge held that the prohibition on disclosure of documents in 42 U.S.C. §2000e-8(e), §709(e) of the

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case the companies were afforded de novo review in the District Court, and have therefore not raised the issue here.

Equal Employment Opportunity Act, applied only to officers and employees of the EEOC. The holding relied on a series of decisions which "uniformly rejected" such arguments. Pet. App. A, at 8a-9a.[11] The ruling was eminently correct; in fact, no Circuit Court which has considered the issue has held otherwise. Sears, Roebuck & Co. v. General Services Administration, supra, 509 F.2d at 529. Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199.[12]

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[11]The District Court also rejected out of hand John Hancock's contention about the applicability of 44 U.S.C. §3508, which subjects agencies receiving documents from another agency to the same disclosure restrictions as the original agency. Ibid. Since the ICS does not receive the EEO-1 forms from the EEOC, whose officials are the only ones expressly covered by §709(e), §3508 must be inapplicable. The only Circuit Court of Appeals ruling on the issue has so found. Sears, Roebuck & Co. v. General Services Administration, supra, 509 F.2d at 529.

[12]Almost all the District Courts that have ruled on the disclosability of EEO-1s by contract compliance agencies have found that §709(e) does not exempt them from disclosure under the (b)(3) exemption of the FOIA. Chrysler Corp. v. Schlesinger, 412 F.Supp. 171, 175 (D. Del. 1976)(on appeal); Crown Central Petroleum Corp. v. Kleppe, 14 FEP Cases 49 (D. Md. 1976); Robertson v. Department

(Continued)

Moreover, the reasons for the District Court's ruling are sound. The insurance companies filed their EEO-1 forms with the ICS,[13] not with the EEOC. The forms were filed pursuant to requirements in regulations implementing Executive Order 11246, as amended, not pursuant to requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Also, officials of ICS, not officials of EEOC, are those who were asked to disclose, and who now seek to disclose, the EEO-1 forms requested.

Congress has recently reaffirmed its intent to limit applicability of §709(e) to officials of the EEOC. In the Government in the Sunshine Act, P.L. 94-409 (Sept. 13, 1976), it clarified the scope of exemption (b)(3). The

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of Defense, 402 F.Supp. 1342 (D.D.C. 1975); Lawyers Cooperative Publishing Co. v. Schlesinger, Civ. Action No. 74-212 (W.D.N.Y. April 22, 1975)(Slip op. at 3); Legal Aid Society of Alameda County v. Shultz, supra, 349 F.Supp. at 775-76 (N.D. Cal. 1972); contra, Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976).

In Chamber of Commerce v. Legal Aid Society of Alameda County, 423 U.S. 1309 (1975), relied on by Petitioners, Justice Douglas, acting as Circuit Justice during the Court's summer recess, denied a stay of disclosure of EEO-1 forms.

[13]See also supra, p. 4, n. 2.

House Report supporting that law states:

> "Section 5(b) amends exemption (3) of the Freedom of Information Act... to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1972)... Examples of statutes that could justify withholding under the amended exemption (3) includes [sic] sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e-5(b), 2000e-8(e) and section 314(a)(3) of the Federal Election Campaign Act (2 U.S.C. §437g(a)(3), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively to withhold certain information relating to informal conciliation and enforcement efforts..." H. Rep. No. 94-880, 94th Cong., 2nd Sess., pp. 22-23 (1976). (emphasis added.)

The House provision was adopted and its purpose reaffirmed by the Conference Committee. See H. Conf. Rep. No. 94-1441, 94th Cong., 2nd Sess., at 25 (1976).

Of course, the OFCCP enforcement mechanism grows out of a term in a contract between the government and Petitioners. See 41 C.F.R. §60-1.4(a). If Petitioners do not wish disclosure of documents submitted under that pro-

gram, they can simply decline the contract.

Moreover, limiting the applicability of §709(e) to the EEOC is sensible and serves the convenience of contractors like Petitioners. That limit increases the likelihood that federal contractors such as Petitioners will be asked to complete a single form providing information useful to a number of federal agencies, rather than several forms seeking similar data. OFCCP regulations require disclosure of EEO-1 forms,[14] and the agency maintains that disclosure is helpful in securing compliance with equal employment laws which it enforces.[15] If §709(e) were held applicable to the forms, rather than to the agency using the forms, OFCCP could simply place a disclaimer on the form, or request the same information on a form with a different name and number.

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[14]See 41 C.F.R. §60-40.4, set forth at p. 2, supra. This clear regulation was in force at the time Petitioners filed their EEO-1 forms for use by OFCCP and ICS. It counters Petitioners' arguments that they were not on notice that ICS and OFCCP would disclose the EEO-1 forms.

[15]See Affidavit of Stephen Ronfeldt and Russell Galloway, Exhibit 2 to D.C. NOW Opposition to Petitioners' Request for Stay Pending Certiorari Before Judgment, filed on January 19, 1977 in Nos. A-586, A-587 and A-588.

Therefore, a ruling that §709(e) applies to officials of agencies other than the EEOC, and bars disclosure of the documents at issue here, would disregard the express language of §709(e), and would be futile.

In the face of the clear language of §709(e), the stated intent of Congress to limit its applicability to the EEOC, and the good sense of such a rule, Petitioners' arguments for another interpretation do not raise a substantial legal question appropriate for certiorari before judgment.

III. THIS COURT NEED NOT CONSIDER THE SECOND ISSUE PRESENTED FOR REVIEW SINCE §1905 IS INAPPLICABLE TO THE MATERIAL AT ISSUE, AND EVEN IF IT WERE APPLICABLE, THE CONFLICT IN THE CIRCUITS AS TO WHETHER MATERIAL COVERED BY §1905 IS EXEMPT FROM DISCLOSURE UNDER EXEMPTION (b)(3) HAS BEEN RESOLVED BY RECENT LEGISLATIVE AMENDMENTS.

Petitioners ask this Court to determine whether 18 U.S.C. §1905 is incorporated in exemption (b)(3) of the FOIA, which exempts from mandatory disclosure information barred from disclosure by other statutes. However, the EEO-1 forms and limited AAP information at issue here is not covered by §1905; therefore, on the facts of this case, the legal issue is only hypothetical and would not affect the outcome of whether the material must be disclosed.

First, on its face 18 U.S.C. §1905 is inapplicable to the material at issue here. Section 1905 does not prohibit disclosure "authorized by law." See text of §1905, Pet. at 5. Disclosure of the equal employment materials at issue here is authorized by law. OFCCP has issued regulations requiring disclosure of EEO-1s and AAPs. See e.g. 41 C.F.R. §60-40.2(b), 41 C.F.R. §60-40.3, 41 C.F.R. §60-40.4.[16] Since disclosure of the material which the District Court found exempt is otherwise authorized by law, it is not barred from disclosure by §1905.

On a second ground as well the material is not covered by §1905. Courts

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[16]These regulations are promulgated pursuant to authority conferred on the Department of Labor by federal Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303, 3 C.F.R. at 169 et seq., prohibiting government contractors from discriminating in employment practices. Executive Order 11246 provides at §201: "The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." That these regulations have the force and effect of law is beyond dispute. See, e.g. Paul v. United States, 371 U.S. 245, 255 (1963); Vitarelli v. Seaton, 359 U.S. 535, 540 (1959).

have repeatedly held that material barred from disclosure under §1905 is the same as that which is exempt from disclosure under FOIA exemption (b)(4). See, e.g. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941, n. 7 (D.C. Cir. 1975); Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1204, n. 38. Since the District Court determined that none of the information at issue before this Court fell within the (b)(4) exemption because disclosure would not cause substantial competitive harm to Petitioners, on the facts as well the material at issue is not covered by §1905. Therefore, even if this Court reached the hypothetical legal question for which Petitioners seek certiorari, and determined as petitioners urge that §1905 is one of the statutes covered by exemption (b)(3), the information before this Court would not be exempt from disclosure under the FOIA.

Furthermore, while it is true that the two Circuits which have considered whether §1905 is within the (b)(3) exemption of the FOIA have split on the issue, recent legislative amendments to the FOIA have resolved the conflict. In September, 1976, shortly before the Fourth Circuit decided Westinghouse, supra, Congress amended (b)(3) to clarify its scope. The amendment was expressly designed to reverse the holding of this Court in Administrator, FAA v. Robertson, 422 F.2d 255 (1975), on which the companies in the instant case and the Court in Westinghouse, supra, relied to establish that §1905 is covered by exemption (b)(3). See Pet. App.

at 22-25; Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1199-1203.[17] The Westinghouse Court did not consider the new legislation.[18] The

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[17]See S. Conf. Rep. No. 94-1178, 94th Cong., 2nd Sess., at 24-25 (1976); House Conf. Rep. No. 94-1441, 94th Cong., 2nd Sess., at 25 (1976). The House Report on the bill, H. Rep. No. 94-880, 94th Cong., 2nd Sess., p. 23 (1976) provided:

> "Under the amendment,... the Trade Secrets Act, 18 U.S.C. §1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding..." (emphasis supplied).

[18]It is possible that the Fourth Circuit did not consider the new legislation because the provisions did not take effect until March 13, 1977. In that case, its ruling has no precedential value at this time, and is not appropriate for consideration by this Court.

District of Columbia Circuit, on the other hand, has reconsidered its earlier decisions that §1905 is not within exemption (b)(3) in light of the recent amendments, and has determined that, a fortiori, §1905 is not covered by exemption (b)(3). See National Parks and Conservation Assn. v. Kleppe, 547 F.2d 673, 678 (D.C. Cir. 1976). Until the Fourth Circuit considers whether the recent FOIA amendment changes its ruling,[19] and until other Circuits have considered the affect of the new law on the scope of exemption (b)(3), consideration by this Court of any "conflict" in the Circuits is clearly premature.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

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[19]Petitioners have suggested that the Government should have asked the Fourth Circuit to review Westinghouse in light of the FOIA amendments, rather than petitioning this Court for certiorari in that case. See Prudential Response to Stay Opposition, at pp. 4-5, n. 2. The failure of the Government to take that course makes it all the more inappropriate for this Court to consider the matter before the Fourth Circuit has had an opportunity to reconsider its ruling in Westinghouse or another case in light of the 1976 FOIA amendments.

Respectfully submitted,

LOIS J. SCHIFFER
MARGARET A. KOHN
Women's Rights Project
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036

COLLOT GUERARD
Media Access Project
1912 N Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent
National Organization for Women,
Washington, D.C. Chapter

OF COUNSEL:

Judith Lichtman
Women's Legal Defense Fund, Inc.
1424 16th Street, N.W.
Washington, D.C. 20036

March 30, 1977

No. 76-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, METROPOLITAN LIFE INSURANCE COMPANY AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN WASHINGTON, D.C. CHAPTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

JEROME ACKERMAN
MICHAEL S. HORNE
BRUCE D. SOKLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Petitioner, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Petitioner, John Hancock Mutual Life Insurance Company

April 7, 1977

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REPLY TO BRIEFS IN OPPOSITION

Several points in the "Brief for Respondent National Organization for Women, Washington, D.C. Chapter, in Opposition" ("NOW Brief") and the "Brief for the Federal Respondents in Opposition" ("Federal Brief"), filed March 30 and 31, 1977, respectively, warrant a response, particularly in light of the subsequent decision by the United States Court of Appeals for the District of Columbia Circuit in

Sears Roebuck & Co. v. *GSA,* —— F.2d —— D.C. Cir. No. 75-2127 (decided April 1, 1977) ("*Sears II*").

1. The Section 709(e) Issue

It is conceded that the EEO-1 reports were obtained by the Joint Reporting Committee on behalf of the EEOC and the Executive Order 11246 compliance agencies. See Petition, pp. 9-10; Federal Brief, pp. 6-7, n.8. This Joint Reporting Committee, however, is nothing more than the alter ego of the EEOC. Petition, p. 10 & n.6. Should circumvention of the Congressional intent expressed in Section 709(e) through the use of a bureaucratic shell be sanctioned? The respondents have not provided a justification for an affirmative answer.

NOW, the private respondent, argues that it would be futile to hold Section 709(e) applicable to disclosure of EEO-1 reports by compliance agencies because those agencies could simply require the filing of the same information on yet another government form carrying a different name or number, which could then be released despite Section 709(e). NOW Brief, p. 15. This begs the issue. If this Court concludes, as we believe it should, that Section 709(e) bars disclosure of EEO-1 reports by compliance agencies, any such transparent attempts to frustrate the import of that holding could be dealt with at the appropriate time. For present purposes, the critical question is whether the compliance agencies should be permitted to render futile a Congressional statute requiring confidentiality for certain information.

2. The Section 1905 Issue

Both respondents concede—and the courts involved categorically acknowledge—that there is a conflict between the Courts of Appeals for the District of Columbia and the Fourth Circuits over the question whether 18 U.S.C. § 1905 is incorporated within the (b)(3) exemption. NOW Brief, pp. 17-18; Federal Brief, p. 8-9.[1] But the respondents argue that the issue over which the conflict exists is immaterial; their theory is that the (b)(4) exemption of the FOIA is co-extensive with Section 1905. *See, e.g.,* NOW Brief, p. 18, citing *Charles River Park "A," Inc.* v. *HUD,* 519 F.2d 935 (D.C. 1975). This theory has now been rejected by the D.C. Circuit in *Sears II*:

> "[I]t does seem clear, as the Government appellees here agree, that § 1905 must be 'considered independent of the FOIA' exemptions. That is, contrary to what we thought in *Charles River Park,* the congruence of § 1905 with exemption 4 is immaterial; the threshold issue now is whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak. . . ." Slip. Op., p. 13 (footnotes omitted).

NOW also argues that the Section 1905 issue has been "resolved" by the recent Congressional amendment of the (b)(3) exemption, while the Federal respondents suggest that the Fourth Circuit must "reconsider" its position on that issue in light of that

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[1] *Compare* Sears Roebuck & Co. v. GSA, 509 F.2d 527 (D.C. Cir. 1974) ("*Sears I*"); National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) *with* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *pet. for cert. pending,* Brown v. Westinghouse Electric Corp., October Term, 1976, No. 76-1192.

amendment. NOW Brief, pp. 18-20; Federal Brief, pp. 7-8.[2] Yet now the D.C. Circuit Court of Appeals—whose position on the Section 1905 issue the respondents are attempting to defend—in *Sears II* has indicated considerable skepticism not about the Fourth Circuit position but rather about its own previously expressed views. The Court of Appeals properly recognized that while the precise result in *FAA Administrator* v. *Robinson*, 422 U.S. 255 (1975), was overturned by the amendment to the (b)(3) exemption, the rationale of *Robertson* clearly indicates that 18 U.S.C. § 1905 is incorporated by the (b)(3) exemption, just as the Fourth Circuit concluded in *Westinghouse*.

[2] In support of its position, NOW relies on a Committee Report discussing proposed legislation that did not pass. The private respondent quotes with supplied emphasis the Report of the House Committee on Government Operations on the Sunshine Act. H. Rep. No. 94-880, 94th Cong., 2d Sess., Part I, 23 (1976); *see* NOW Brief, p. 19 n.17. However, as indicated in the Petition, the Committee version of the (b)(3) amendment that the Government Operations' Report was referring to *was not adopted*. The bill went from the Government Operations Committee to the House Judiciary Committee, which changed the proposed (b)(3) revision because of its unduly restrictive scope. H. Rep. No. 94-880, 94th Cong., 2d Sess. Part II, 7 (1976). Moreover, on the House floor, a substitute revision was introduced which, with one clarifying addition in conference, was the version of the amendment that was finally enacted into law. 122 Cong. Rec. H7897 (daily ed. July 28, 1976). There is nothing in the relevant legislative history such as the authoritative Conference Report which suggests an intent to adopt the House Government Operations Committee's position. Instead, the remarks of the sponsor of the House floor amendment, Congressman McCloskey, indicate that the intent was to *include* within the exemption generally worded, nondiscretionary confidentiality statutes, which he believed were excluded from the Government Operations Committee's proposal. 122 Cong. Rec. E41897-98 (daily ed. July 29, 1976); *see* 122 Cong. Rec. H7897-98 (daily ed. July 28, 1976), E4148 (daily ed. July 28, 1976). 18 U.S.C. § 1905 is clearly such a statute.

Moreover, it found nothing in the recent amendment to strengthen its prior view that *Westinghouse* was in error. But instead of "reconsidering" its position, the D.C. Circuit in *Sears II* in effect asked this Court to speak to the issue.

> "We recognize that this court's decisions in *National Parks II* and *Charles River Park* conflict with that of the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*. The Solicitor General has sought certiorari in *Westinghouse*. Raising similar issues, several insurance companies have filed a petition for writ of certiorari to this court to review before judgment the companies' appeals from a decision of the United States District Court for the District of Columbia in [the instant case] . . . .
>
> "Any reconsideration by us of the issue as to what extent 18 U.S.C. § 1905 falls within exemption 3 of the FOIA and thus forbids the disclosure of the records here (assuming that they fall within the description of § 1905) would necessarily be a reconsideration of the view of a panel of this court in *National Parks II, supra,* expressed most recently in light of both actions by the Supreme Court and Congress. While the court in *National Parks II* specifically labeled its views on § 1905 and exemption 3 as dicta, and theoretically we would be free to reconsider the issue, *if* we deemed it essential to the disposition of this case, yet given the presently pending matters in the Supreme Court, we think it inadvisable to express an additional view on the same issue.
>
> "Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court on the afore-

mentioned pending matters. Irrespective of the outcome in the Supreme Court, in reviewing the particular issue the District Judge will doubtless bear in mind, as regards his freedom of action under our own decisions, that this court's views in *National Parks II, supra,* were classed as dicta, and that our views in *Charles River Park, supra,* were expressed before the Supreme Court decision in *Robertson, supra,* or the ensuing Congressional amendatory action." Slip. Op., pp. 11-13 (footnotes omitted).

Thus, just as the District Court in the instant case saw "substantial issues" warranting appellate review, including review by this Court (Petition, p. 45a), so too the panel of the D.C. Circuit that decided *Sears II* appears to be welcoming if not actually soliciting review of the instant case by this Court.

3. The Appropriateness of Issuing A Writ of Certiorari Before Judgment

NOW, the private respondent, urges that issuance of a writ of certiorari before judgment so that this case could be taken up with *Westinghouse* would be in appropriate because *to date* the petition in *Westinghouse* has not yet been granted. NOW Brief, p. 9. This point has no substance. As the oppositions to the petition in *Westinghouse* are presently due on April 27, 1977, the question of issuing a writ in that case will be ripe for decision in the very near future. NOW offers no reason for rushing to a denial of certiorari in this case before the issue is joined in *Westinghouse.* The two petitions can and should be considered together.

Both respondents urge that, even if certiorari is granted in *Westinghouse,* it should be denied here

because the issues in the two cases are said to be different or not fairly encompassed within each other. NOW Brief, pp. 10-11; Federal Brief, pp. 10-12.[3] To be sure, the issues posed by the Government in *Westinghouse* are in the nature of procedural or jurisdictional questions while those raised by the petitioners in the instant case go to the merits. Nevertheless, the issues are closely interrelated, as one would expect in two "reverse-FOIA" suits involving precisely the same type of documents. The same issues as the Government is now pressing in *Westinghouse* were raised below by both the private and Federal respondents in the instant case, and are still being pursued at this time.[4] If we are successful on the merits, the procedural barriers which the Government seeks to erect in *Westinghouse* should not suffice to deny relief to the private parties. For example, the agency housekeeping regulations relied upon by the Government in *Westinghouse* cannot abrogate criminal statutes such as 18 U.S.C. § 1905. Further, even on limited abuse-of-discretion review one could establish a right to relief from governmental action contrary to the statutory mandates relied upon here. Even assuming *arguendo* the Government is correct in asserting that the private party in *Westinghouse*

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[3] Apparently a contrary conclusion was reached by the D.C. Circuit in *Sears II* in which the petition in the instant case was described, in relation to the *Westinghouse* case, as "[r]aising similar issues. . . ." Slip Op., p. 12.

[4] For example, in its recently filed opening brief in the Court of Appeals, NOW challenges *de novo* review in the reverse FOIA context, at least beyond the precise facts of *Charles River Park,* in much the same manner as the Government challenges *de novo* review in *Westinghouse.* See Brief for the Appellant/Cross-Appellee, pp. 25-32, National Organization for Women, Washington, D.C. Chapter v. Social Security Administration, D.C. Cir. Nos. 76-2119, *et al.* (March 21, 1977).

could not press the points urged on the merits by the petitioners in this case due to the absence of a cross-petition in *Westinghouse* (Federal Brief, pp. 9-10), it does not follow that the Court should deny the instant petition so as to deprive itself of the opportunity to consider all of the dispositive issues common to these two cases. In any event, the fact that one of two similar cases may pose one or more unique issues does not negate the desirability of taking the two cases together by issuing a writ of certiorari before judgment in one of them. *Cf. Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

Finally, both respondents urge that certiorari before judgment in this case would be inappropriate because petitioners should first attempt to persuade the Court of Appeals that its prior decisions were wrong, or that the District Court should be reversed on other grounds.[5] Federal Brief, pp. 12-13; NOW Brief, p. 7, n.7. The short answer to these contentions is that in *Sears II* the Court of Appeals made it clear that it was reluctant to reconsider its position on the issues posed herein. Indeed it said, evidently hoping that this Court would review the matter, that "we think it inadvisable to express an additional [D.C. Circuit] view on the same issue." Slip. Op., p. 12.

But more fundamentally, there is much more at stake here than the confidentiality of the particular docu-

[5] This latter point is presumably an allusion to the possibility of persuading the Court of Appeals that the District Court's findings of fact on the (b)(4) and (b)(6) exemption issues were clearly erroneous insofar as they are intended to support the denial of a preliminary injunction. Given the refusal of the Court of Appeals to preserve the *status quo* by entering a stay order pending resolution of controlling issues of law, this suggestion must be disregarded as impractical.

ments of the petitioners in the instant case. In seeking certiorari in *Westinghouse* the Government notes that "at least 78 reverse FOIA suits were brought against the government" during 1976, and that there appears to be "a steadily increasing number" of such cases. Petition in No. 76-1192, p. 11 & n.15. The *amicus curiae* in *Westinghouse* has made it clear, not only by his words but also by his action of staying out of the Fourth Circuit litigation while bringing an FOIA suit based on the same facts in the U.S. District Court for the District of Columbia, that there is a considerable amount of forum-shopping in FOIA suits not only by those seeking to protect confidentiality as he charges but also by those seeking to compel disclosure of information. *See* Brief of Reuben B. Robertson, III, *Amicus Curiae* Supporting the Petition in No. 76-1192 (March 18, 1977). Forum shopping is prompted largely if not entirely by the differing interpretations of substantive FOIA law found in the various District Courts and Courts of Appeals. There are, in short, compelling public interest considerations which justify prompt clarification by the Court of the substantive issues through issuance of a writ of certiorari at this time—public interest considerations which the respondents simply have not addressed.

Respectfully submitted,

JEROME ACKERMAN
MICHAEL S. HORNE
BRUCE D. SOKLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner, The Prudential Insurance Company of America

J. AUSTIN LYONS
MARGARET F. KELLY
One Madison Avenue
New York, New York 10010

Attorneys for Petitioner, Metropolitan Life Insurance Company

WILLIAM F. JOY
ROBERT P. JOY
One Boston Place
Boston, Massachusetts 02108

Attorneys for Petitioner, John Hancock Mutual Life Insurance Company

April 7, 1977